In forma pauperis
Petition not printed

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 669

BENNY LURK, PETITIONER,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 21, 1960
CERTIORARI GRANTED JANUARY 23, 1961

Supreme Court of the United States

OCTOBER TERM, 1960

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BENNY LURK, PETITIONER,

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[fol. A]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal Action No. 180-60

UNITED STATES OF AMERICA

v.

BENNY LURK, DEFENDANT

Washington, D. C.
Tuesday, March 22, 1960.

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for trial at 11:15 a. m. before the HONORABLE JOSEPH R. JACKSON, Judge, and a jury.

APPEARANCES:

On behalf of the Government:

JOHN W. WARNER, JR.
Ass't United States Attorney.

On behalf of the defendant:

RALPH C. COLE, ESQ.
1735 - 14th St. N.W.
Wash. 9, D. C.

[fols. 3-8]

[fol. 9] CHARLES C. EDGEWORTH

was called as a witness by and on behalf of the Government and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

[fol. 10] BY MR. WARNER:

[fol. 11] A. I paid the girl for my 2 meals and bottle of beer and the other girl was getting them ready and I was sitting there drinking the beer and a boy walked in with him.

Q. When you say him, who do you mean?

A. With Benny. The other fellow was in front of Benny.

Q. When you say Benny, do you mean one Benny Lurk?

A. That is right.

Q. The defendant in this case?

A. That is right.

Q. Where is he in the courtroom today?

A. Sitting right here.

Q. How is he dressed?

A. He was dressed—

Q. How is he dressed today?

THE COURT: How is he dressed now?

THE WITNESS: He has got on a brown jacket.

BY MR. WARNER:

Q. With or without necktie?

A. No necktie.

MR. WARNER: May the record show this witness has identified the defendant, Your Honor?

THE COURT: The record may so show.

BY MR. WARNER:

[fol. 12] Q. Now, Mr. Edgeworth, have you known the defendant prior to this day, December 14, 1959?

A. I didn't know his name, but I knew his face.

Q. You had seen him before, correct?

A. Yes, sir.

Q. Where had you seen him?

A. In Occoquon.

MR. WARNER: I think we should strike that answer, Your Honor. I didn't realize that was the case.

THE COURT: It may be stricken.

BY MR. WARNER:

Q. So you had seen him before this date, is that correct?
A. That is right.

[fols. 13-14]

[fol. 15] CROSS EXAMINATION

BY MR. COLE:

[fols. 16-26]

[fol. 27] Q. And what did you do at headquarters?
A. I described the men to them and told them what happened.
Q. And you told them that you knew this man; is that correct?
A. I told them I knew his face but didn't know his name.
Q. I believe you mentioned that you knew this man at Occoquon; is that right?
MR. WARNER: I think that answer has been stricken from the record, Your Honor.
THE COURT: The question may be stricken.
MR. COLE: Your Honor, I believe I have a right to ask where he knew this man.
THE COURT: If this man has a record all right. Why do you mention Occoquon?
MR. COLE: Of course, we are not introducing his record at this time, but I think—
THE COURT: Why don't you ask him where he saw him first?

BY MR. COLE:

Q. Where did you first see this man, Mr. Lurk?
A. 7th and T.
Q. When was this?
[fol. 28] A. Over 4 or 5 years ago, maybe longer.
Q. Did you know him at that time?
A. No, I never knew him. I just knew his face when I would see him.

Q. You saw this man for the first time in your life at 7th and T Streets, Northwest; is that correct?

A. That is right.

Q. What happened that impressed his identity upon you?

A. The man was sitting in the next booth to me drinking beer.

Q. 7th and T about 4 or 5 years ago?

A. Yes, it may be longer than that.

Q. Did you have any conversation with him at that time?

A. No.

Q. Well, what happened that his identification was impressed upon you at that particular time?

A. His identification wasn't impressed upon me.

Q. How can you so clearly remember that you saw Benny Lurk 5 years ago at 7th and T Streets, Northwest?

A. Any time I see a person's face one time I never forget it.

Q. I see. Now, where was the next time you saw Benny Lurk?

A. 7th and T.

[fol. 29] Q. 7th and P, as in Paul?

A. 7th and P Streets, Northwest.

Q. Is that P as in Paul?

A. Yes, P as in Paul.

Q. When was that occasion?

A. Oh, that wasn't very long after I seen him at 7th and T.

Q. At the same bar room?

A. No, it wasn't.

Q. Standing on the street?

A. Standing outside on the sidewalk. He was with some more people talking.

Q. And you talked with him?

A. No, I didn't talk with him. I was talking to another fellow named March.

Q. When was the next time that you saw him after that particular instance?

A. From time to time I have seen Benny for the l
5 or 6 years, from time to time, but not knowing
name.

Q. Would you call him a friend of yours?

A. I don't.

Q. An acquaintance?

A. No.

Q. Did you ever talk to Benny?

[fol. 30] A. Once.

Q. Where was that?

A. 7th and P.

Q. Do you recall what the conversation was?

A. He wanted to get a drink, me and him and Marc

Q. Did you want a drink too?

A. No.

Q. How long ago was that?

A. That was long in April or May.

Q. Now, you described each and every time that yo
have ever seen Benny Lurk?

A. Yes.

Q. Other than these times at 7th and P Streets, yo
have never seen Benny Lurk, is that right?

A. Yes.

Q. You have seen Benny Lurk other than those times

A. Yes.

Q. I thought you just got through—

THE COURT: He told you yes, he saw him. No
pursue your question.

THE WITNESS: Me and Benny done a year in Occo
quon, that is why I knew him.

Q. What were you charged with?

A. Assault.

[fol. 31] Q. You did a year in Occoquon?

A. That is right.

Q. You saw Benny there, you say?

A. Yes, I used to be the food adviser.

[fols. 32-52]

[fol. 53] THE COURT: Closing argument for the de
fendant.

MR. COLE: May it please the Court, may it please you ladies and gentlemen of the jury:

. . . .

[fol. 54] . . . .

. . . .

[fol. 55] These are things that you have to decide. These [fol. 56] are the facts as we have heard them from the stand from the mouth of the only witness who has identified Benny Lurk. And what kind of witness do we have? We have a witness who himself is a convicted criminal. I don't know why he identified Benny Lurk. He may have a grudge against him. He said he has known him for 4 or 5 years. And then we have this situation, over 6 weeks passes by and then suddenly one day Mr. Edgeworth, the complaining witness, sees Benny Lurk, the face that he never forgets, and he calls the police and they come. And they take Benny Lurk to headquarters.

. . . .

[fol. 57-59] . . . .

. . . .

[fol. 60] JUDGE'S CHARGE

. . . .

[fols. 62-65] . . . .

. . . .

[fol. 66] The Court instructs you that you are to draw no inferences whatsoever as to the guilt of the defendant from the fact that the complaining witness, Mr. Edgeworth, testified that he and the defendant met at Occoquon.

Testimony by the complaining witness in that respect is to be considered only in as far as it affects his credibility as a witness.

The law does not compel any defendant to take the [fol 67] witness stand and testify, therefore, no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of the defendant to testify. The defendant is under no obligation to testify when he is being tried.

. . . .

[fols. 68-70] . . . .

[fol. 71] AT THE BENCH

THE COURT: Are you satisfied with the instructions?
MR. WARNER: The Government is satisfied.
MR. COLE: Satisfied, Your Honor.

. . . .

[fols. 72-74] . . . .

. . . .

[fol. 75] Reporter's Certificate to foregoing transcript omitted in printing

[fol. 76] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Misc. No. 1481

BENNY LURK, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR LEAVE TO PROSECUTE APPEAL WITHOUT PREPAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF—Filed May 16, 1960

The petitioner, Benny Lurk being first duly sworn, on oath deposes and says that he desires to appeal from the order (or judgment) entered in the District Court on April 29, 1960 in Crim. No. 180-60, Benny Lurk v. United States of America, and is unable to pay the costs of the appeal, or to give security therefor; and that he believes that he is entitled to redress.

Your petitioner further states that subsequent to the entry of the order (or judgment) an application to prosecute an appeal from the order (or judgment) without prepayment of costs, accompanied by an affidavit in conformity with Section 1915 of Title 28, U. S. Code, was on April 28, 1960, made to the trial court, thereby enabling the trial judge to certify whether or not the appeal was taken in good faith, and that the trial court on May 4, 1960, denied petitioner's application.

The nature of the appeal is as follows:

To appeal from the conviction and judgment rendered by United States District Court for the District of Columbia on the 29th day of April, 1960, Honorable Judge Jackson presiding, and list as the reasons for his appeal the following:

1.—Denied due process of law by having incompetent counsel appointed by the court who failed to

summons witnesses who were vital to petitioner's defense.

2.—No probable cause for arrest.

3.—No positive identification made at any time.

4.—Denied a fair and impartial trial.

5.—Arrest was made on mere suspicion. (See Poldo v. United States, 55 F 2d 866, 869.) As follows: "Mere suspicion is not enough, there must be circumstances represented to the arresting officers through testimony of their senses sufficient to justify them in a good faith belief that the defendant had violated the law . . ."

[fol. 77] WHEREFORE, petitioner requests that he be allowed to appeal from the order (or judgment) without being required to prepay fees or costs, or to give security therefor.

/s/ Benny Lurk
Petitioner.

Duly sworn to by Benny Lurk. Jurat omitted in printing

[fol. 78] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1481

[Title omitted]

Before: Prettyman, Chief Judge, in Chambers.

ORDER APPOINTING COUNSEL—May 18, 1960

Upon consideration of the petition for leave to prosecute an appeal in forma pauperis, it is

ORDERED that Eugene Gressman, Esquire, a member of the bar of this court, is appointed to represent petitioner and allowed until June 18, 1960, to file a memorandum in support of the petition.

[fol. 79] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1481

[Title omitted]

MOTION FOR PRODUCTION OF TRANSCRIPT—
Filed June 15, 1960

Petitioner, through his Court-appointed counsel, hereby moves the Court for an order directing that a transcript of the trial proceedings in the District Court, held on March 22, 1960, be prepared at the expense of the United States and that petitioner's counsel be given at least 30 days following the receipt of such transcript to prepare and file a memorandum in support of the petition for leave to prosecute an appeal *in forma pauperis*. As grounds for this motion, petitioner's counsel states:

1. Following his appointment by this Court as counsel for petitioner, counsel examined the available court files, interviewed the petitioner and conferred with Mr. Ralph C. Cole, the attorney appointed to represent petitioner at the trial in the District Court. These measures were taken in order to determine as accurately as possible whether there exists any non-frivolous grounds of appeal, and, more particularly, whether there is any basis for asserting, as petitioner has done *pro se*, that (1) he was represented at the trial by incompetent court-appointed counsel who failed to summon vital witnesses, (2) that there was no probable cause for arrest, (3) there was [fol. 80] a denial of a fair and impartial trial and (4) there was no positive identification made of the petitioner at any time.

2. The absence of a transcript, however, has made it impossible for counsel to evaluate and present the merits of this appeal in such a manner as to do full justice to petitioner and to fulfill his duties to this Court. Particularly after conferring with court-appointed trial counsel, this counsel is not convinced that the trial was conducted

free of all reversible errors or that there was a complete absence of plain errors going to the justness and fairness of the proceeding.

3. Thus in a case of this nature, the merits or frivolousness of the appeal cannot be tested or determined by any means other than an examination of the trial record. The available sources of information outside the record—the formal files and the memory of certain individuals—are too incomplete and uncertain to constitute a substitute for the transcript. And if counsel is to be enabled to give full effect to the direction of the Supreme Court in *Ellis* v. *United States*, 356 U.S. 674, that "representation in the role of an advocate is required," the transcript must be made available. See *Griffin* v. *Illinois*, 351 U.S. 12.

Wherefore, it is submitted that the transcript should be prepared at the expense of the United States.

Respectfully submitted,

/s/ Eugene Grossman
1701 K Street, N.W.
Washington 6, D. C.
Counsel for Petitioner
appointed by this Court

[fol. 81] CERTIFICATE OF SERVICE
(omitted in printing)

[fol. 82] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1481

[Title omitted]

Before: Edgerton and Bazelon, Circuit Judges, in Chambers.

ORDER DIRECTING THAT STENOGRAPHIC TRANSCRIPT BE FURNISHED—July 8, 1960

On consideration of petitioner's motion to have stenographic transcript prepared at the expense of the United States, respondent's opposition, and petitioner's reply, it is

ORDERED by the court that petitioner be allowed to prosecute an appeal without prepayment of costs to the extent of having the transcript of the proceedings in the District Court prepared without costs, and it is

FURTHER ORDERED by the court that the stenographic transcript of proceedings in this case in the District Court be furnished to petitioner at the expense of the United States.

Per Curiam.

Dated: July 8, 1960

[fol. 83] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1481

[Title omitted]

MEMORANDUM IN SUPPORT OF PETITION FOR LEAVE TO PROSECUTE AN APPEAL IN FORMA PAUPERIS—
Filed August 31, 1960

This memorandum is filed pursuant to this Court's order dated May 18, 1960, appointing the undersigned counsel to represent the petitioner. On July 8, 1960, in response to a motion made on behalf of the petitioner, the Court ordered that petitioner be allowed to prosecute the appeal without prepayment of costs to the extent of having the transcript of the trial proceedings in the District Court prepared without costs and furnished to petitioner at the expense of the United States. Counsel has accordingly had the benefit of such transcript in the preparation of this memorandum.

STATEMENT OF THE CASE

On January 27, 1960, a report was filed in the District Court concerning a proceeding had the previous day before United States Commissioner James F. Splain. That report recited that the petitioner had been arrested for an alleged violation of the robbery statute, 22 D.C. Code 2901, that he had been brought before the Commissioner and informed of his right to retain counsel, and that petitioner had requested an immediate hearing. The report then summarized the testimony of the witness for the United States, Charles C. Edgeworth, as follows:

[fol. 84] ". . . on Dec. 14, 1959 while in Miss Jones' restaurant between 10 and 10:30 P.M., waiting for a carry out food order, the def. and another man came into the place; *that he knows the Def. because he*

served a year in Jail with the Def.; that the other man stuck a knife into him and said don't move; that while he was being held at knife point, the Def. went into his pockets and removed his money and also took his eyeglasses; that he was cut in the hand by the knife and the Def. and the other man ran out; that he went home and called the police." (Emphasis added).

The report concluded by stating that probable cause had been shown. Bail was fixed at $5000 and petitioner, who had not testified, was committed to jail.

On February 23, 1960, a one-count indictment was filed in the District Court charging that petitioner "stole and took from the person and from the immediate actual possession of Charles C. Edgeworth property of Charles C. Edgeworth of the value of about $58.31 consisting of the following: one billfold of the value of $2.00, $46.31 in money and one pair of eyeglasses of the value of $10.00."

The following day, February 24, Ralph E. Becker was appointed to represent the petitioner, but on February 26, Ralph S. Cole was appointed in his stead. Petitioner was arraigned on February 26, without counsel present; he entered a plea of not guilty and was remanded to the District jail. On March 4, with counsel Cole present, petitioner was arraigned again and again pleaded not guilty.

Trial was had before the jury on March 22, 1960, Judge Joseph R. Jackson presiding. At the trial, four witnesses testified for the United States and none for the defense. The testimony of the prosecution witnesses may be summarized as follows:

Charles C. Edgeworth, the complaining witness, testified that on the evening of December 14, 1959, he had gone to Miss Jones' Restaurant at 9th and O Streets, N. W., in [fol. 85] Washington, D. C., to order some food to take out. While waiting for the food to be prepared he ordered and drank a bottle of beer. Tr. 11. The petitioner and a companion walked into the restaurant at that point. The companion put a knife to Edgeworth's stomach while petitioner rifled his pockets and snatched money from his hands. Tr. 13. Edgeworth was cut on the hand by the

knife. Tr. 13. Petitioner and his companion (who was never identified) then ran out of the restaurant. Tr. 13. Edgeworth told a waitress that he had been robbed of his money. Tr. 14. He then got a cab, went home and called the police. Tr. 14. Some time later he observed petitioner near a street corner, called the robbery squad, and pointed petitioner out to the policemen who arrived in answer to the call. Tr. 14. Petitioner was thereupon arrested. Edgeworth also testified as to the amount of money and the value of the other items taken from him. Tr. 15.

Edgeworth was cross-examined thoroughly by petitioner's appointed counsel. Tr. 15-35. On cross-examination, Edgeworth recounted more details as to the incidents in the restaurant, including certain remarks made by petitioner and his companion in the course of the robbery. Tr. 18-19. He stated that there were about 15 to 20 people in the restaurant at the time. Tr. 23. He further stated that about 10 minutes elapsed between the robbery and the moment when the food he had ordered was ready. Tr. 25. He told one of the waitresses that he had been robbed, and she told him not to follow the men. Tr. 21. Finally, when his food was ready, Edgeworth departed in a cab, went home and called the police. Tr. 24. There was a phone booth in the restaurant but he did not use it. Tr. 25. The police, in response to his call from home, told Edgeworth to come to headquarters the following [fol. 86] morning. Tr. 26, at which time he told what happened and described the men. Tr. 27. He stated to the police that he knew petitioner's face but not his name. Tr. 27. Edgeworth recounted that he had seen petitioner on various occasions in the past. Tr. 27-30.

Edgeworth was also cross-examined as to the events on January 26, 1950, when petitioner was arrested. Tr. 32-35. He happened to see petitioner in front of a beer garden at the corner of 7th and P Streets, N. W. Tr. 33. Edgeworth immediately went inside a drug store and called the police, who sent a squad car. Tr. 33. Edgeworth got into the squad car and pointed out petitioner to the officers, petitioner having moved in the meantime to a parking lot on 8th Street. Tr. 34.

Annie Alston, the second prosecution witness, was a waitress at the restaurant. She recalled that Edgeworth had been in the restaurant on the night in question and that she had observed money being snatched from Edgeworth's hands. Tr. 37. She also had seen the cut on Edgeworth's hand but did not see the men who took the money. Tr. 37. On cross-examination, she testified that four men had come into the restaurant and had sat down at a table. Tr. 41. They left right after the robbery but she did not know who they were. Tr. 42. She did not see any of them rifle Edgeworth's pockets but did see one of them snatch money from Edgeworth's hand. Tr. 42. Edgeworth started to follow them out but then returned. Tr. 43. She heard him tell another waitress that he had been robbed. Tr. 43.

The other waitress referred to by Annie Alston was not produced as a witness, the Assistant United States Attorney stating that efforts to locate her had proved futile. Tr. 45.

The other two witnesses for the prosecution were *Detective George R. Wilson* and *Private David B. McQueen*. The first officer testified that Edgeworth had told him of the robbery on the morning of December 15 and had de- [fol. 87] scribed petitioner to him, though not by name. Tr. 46-47. Private McQueen testified that he had placed petitioner under arrest on January 25, after being called by Edgeworth to the vicinity of 7th and P Streets, N. W. Tr. 49-50.

Following the presentation of this testimony the United States rested its case and the defense waived "its right to place the defendant on the stand." Tr. 48. In addition to the foregoing summary of testimony, the following colloquies are to be noted:

(Direct examination of Edgeworth by Assistant United States Attorney, Tr. 12.)

Q. Now, Mr. Edgeworth, have you known the defendant prior to this day, December 14, 1959?

A. I didn't know his name, but I knew his face.

Q. You had seen him before, correct?

A. Yes, sir.

Q. Where had you seen him?

A. In Occoquon.

MR. WARNER: I think we should strike that answer, Your Honor, I didn't realize that was the case.

THE COURT: It may be stricken.

(Cross-examination of Edgeworth by petitioner's appointed counsel, Tr. 27.)

Q. And what did you do at headquarters?

A. I described the men to them and told them what happened.

Q. And you told them that you knew this man; is that correct?

A. I told them I knew his face but didn't know his name.

Q. I believe you mentioned that you knew this man at Occoquon; is that right?

MR. WARNER: I think that answer has been stricken from the record, Your Honor.

[fol. 88] THE COURT: The question may be stricken.

MR. COLE: Your Honor, I believe I have a right to ask where he knew this man.

THE COURT: If this man has a record all right. Why do you mention Occoquon?

MR. COLE: Of course, we are not introducing his record at this time, but I think—

THE COURT: Why don't you ask him where he saw him first?

(Cross-examination of Edgeworth by petitioner's appointed counsel, Tr. 30-31)

Q. You have seen Benny Lurk other than those times?

A. Yes.

Q. I thought you just got through—

THE COURT: He told you yes, he saw him. Now pursue your question.

THE WITNESS: Me and Benny done a year in Occoquon, that is why I knew him.

Q. What were you charged with?
A. Assault.
Q. You did a year at Occoquon?
A. That is right.
Q. You saw Benny there, you say?
A. Yes, I used to be the food adviser.

* * * * *

(Closing argument by petitioner's appointed counsel. Tr. 56.)

These are the facts as we have heard them from the stand from the mouth of the only witness who has identified Benny Lurk. And what kind of witness do we have? We have a witness who himself is a convicted criminal. I don't know why he identified Benny Lurk. He may have a grudge against him. He said he has known him for 4 or 5 years.

* * * * *

[fol. 89] *(Judge's charge to jury, Tr. 66.)*

The Court instructs you that you are to draw no inferences whatsoever as to the guilt of the defendant from the fact that the complaining witness, Mr. Edgeworth, testified that he and the defendant met at Occoquon.

Testimony by the complaining witness in that respect is to be considered only in as far as it affects his credibility as a witness.

* * * * *

At the conclusion of the trial, the jury found petitioner guilty as charged. A motion for a new trial was denied on March 29, 1960. Petitioner was then duly sentenced to a prison term of not less than 4 years and 9 months and of not more than 14 years and 3 months.

On April 29, 1960, the District Court granted the petition of Ralph C. Cole to be relieved of his assignment to defend petitioner. Petitioner then filed *pro se* a motion for leave to appeal *in forma pauperis*, which motion the District Court denied on May 4, 1960, "as plainly frivolous and not made in good faith."

Petitioner's *pro se* petition for leave to appeal *in forma pauperis* was filed in this Court on May 16, 1960.

Substantial Questions Presented By the Record

On behalf of the petitioner, it is submitted that there are at least two questions posed by the record that are non-frivolous and, indeed, substantial in nature so as to warrant the grant of permission to proceed *in forma pauperis*. Certain other questions raised by the petitioner *pro se* are, in the opinion of undersigned counsel, either [fol. 90] without merit or are subsumed under the first question presented herewith.[1]

---

[1] Petitioner *pro se* has made the following points:

1. He was denied due process by having incompetent counsel appointed by the District Court who failed to summon witnesses vital to the defense of petitioner. But the undersigned counsel suggests that the said appointed counsel, insofar as the formal record is concerned, conducted a vigorous defense on behalf of petitioner. Inquiry of said appointed counsel has revealed that he did not call other witnesses since he did not feel that they could contribute any testimony helpful to the defense. If there is to be any criticism of that counsel, it is in terms of his failure to raise specific objections to the questions, answers and jury charge in connection with the first substantial question presented in this memorandum.

2. There was no probable cause for arrest. But the complaint of the complaining witness and his description and pointing out of the petitioner would seem to provide sufficient cause.

3. No positive identification at any time. But the complaining witness did identify petitioner at the time of his arrest. The complete reliance on the complaining witness for identification purposes, however, is implicitly involved and is of some importance in the first substantial question discussed in this memorandum.

4. Petitioner was denied a fair and impartial trial. It is not clear to what this allegation refers. But see the first point discussed in this memorandum.

5. Petitioner's arrest was made on mere suspicion. But see point 2 above.

I. *Do the references at the trial to petitioner's past criminal record constitute plain reversible error?*

Axiomatic, of course, is the proposition that where a criminal defendant does not take the stand evidence as to his unsavory character or past criminal record is inadmissible. This is so, not because of its irrelevance, but because of a dominant policy which recognizes that what tends to show a likelihood that the accused has flouted the law at some other time is too apt to be given undue weight by the jury and to prejudice his right to a fair trial on the instant charge. *Michelson* v. *United States*, 335 U.S. 469, 475; *Boyd* v. *United States*, 142 U.S. 450.

In this case, the record contains repeated references to the fact that petitioner had previously been in prison [fol. 91] at Occoquon Workhouse, a well-known jail for District of Columbia prisoners. Since petitioner did not take the stand in self-defense, a serious and substantial question is thereby raised in terms of the above-stated policy. Full review and consideration of this case is necessary in order to determine if petitioner has been accorded a full measure of his constitutional right to a fair trial. Several facets to this problem are presented by the record:

A. *The prosecution was responsible for the first reference to petitioner's past criminal record.* As previously indicated herein (pp. 1-2, *supra*), about two months before the trial, the U. S. Commissioner filed a report which summarized the evidence of the complaining witness. That report indicated that the witness testified that he had identified the petitioner "because he served a year in Jail with the Def". And that report was presumably in the hands of the Assistant United States Attorney, *or at least available to him*, when he examined the complaining witness on the stand at the trial.

Thus when the Assistant United States Attorney asked the complaining witness where he had seen the petitioner before, he must have known or *should have known* that the witness would answer to the effect that he had seen petitioner in jail. Tr. 12. The prosecutor cannot be heard to say, as he did, that "I didn't realize that was the case." Tr. 12.

But even if it be considered that the answer was unexpected, and inadvertent from the Government's point of view, the fact remains that the answer was elicited by Government counsel and not by the defense. Cf. *United States* v. *Tramaglino*, 197 F. 2d 928, 932 (C.A. 2). Error was committed by the reference to petitioner's prior presence at Occoquon, a reference made in the presence of the jury.

[fol. 92] The availability of the earlier report of the U. S. Commissioner, however, makes pertinent the language and holding of the court in *United States* v. *Tomaiolo*, 249 F. 2d 683, 695-696 (C.A. 2):

> "And it is fairly apparent that the prosecutor knew that the answers to his questions would reveal Soviero's criminal past. Certainly the special agents of the FBI had already advised him, out of court, of the reason why Soviero refused to sign the statement.
>
> "Nor may Tomaiolo's testimony be classed as purely voluntary. Even if he did not have actual knowledge of the times during which Louis Soviero was in prison, the prosecutor had the means of gaining such information. Yet he pressed the reluctant Tomaiolo to answer . . ."

B. *The reference to petitioner's criminal record was not an isolated one but was reiterated on several occasions.* Had there been but the one instance of mentioning petitioner's former incarceration, an argument could be made that it was sufficiently isolated and immediately stricken so as to be inconsequential. See *United States* v. *Stromberg*, 268 F. 2d 256, 269 (C.A. 2). But such is not this case. Petitioner's court-appointed counsel brought out the matter again in a question[2] which was stricken before an answer could be given. Tr. 27. But almost immediately the trial judge himself mentioned Occoquon, asking coun-

[2] The attorney apparently asked the question to bring out the fact that the witness rather than the petitioner had a criminal record. Tr. 27. See his closing argument. Tr. 56. But the question was artlessly phrased and served to emphasize petitioner's record.

sel "why do you mention Occoquon?" Tr. 27. The damage was further compounded a short while later when the complaining witness, immediately after a direction by the judge to pursue the preceding question, volunteered the information again that petitioner had "done a year at [fol. 93] Occoquon." Tr. 30. This time no objection was made and the answer remained unstricken.

Finally, the Court itself, in its charge to the jury, reiterated the fact that petitioner and the complaining witness had "met at Occoquon," Tr. 66, and that this fact should be considered only in connection with the credibility of the complaining witness.

Here, then, was an accumulation of the original remark, which had been induced by the prosecution. A serious question is thus raised as to whether the mere striking of the original answer of the defense counsel's subsequent question was enough to cure the error, repeated as it was on at least four occasions. Cf. *United States* v. *Giallo*, 296 F. 2d 207, 209-210 (C.A. 2), affirmed, 346 U.S. 929. To the extent that petitioner's trial counsel contributed to the error, it must be remembered that he was appointed by the court below and was not of petitioner's own choosing. In that setting, it may be unfair to saddle petitioner with the consequences of such an error by appointed counsel. But more importantly, the whole chain of references originated in the original question by the prosecution and was repeated by the court itself and by the complaining witness without accompanying disavowals to the jury. Tr. 30, 66. Such a chain of events, all emphasizing petitioner's prior record, could only serve to prejudice the jury and deprive petitioner of a fair trial. *United States* v. *Tomaiolo*, 249 F. 2d 683, 695 (C.A. 2).

C. *The error was not cured by adequate instructions to the jury or other action of the trial judge.* When the complaining witness first mentioned the petitioner's prior incarceration, the trial judge did no more than strike the answer on the prosecutor's request. Tr. 12. The judge [fol. 94] also did no more than strike defense counsel's question referring to that previous answer, again on the prosecutor's suggestion. Tr. 27. But when the witness subsequently volunteered the fact that "Me and Benny

done a year at Occoquon," Tr. 30, the prosecutor, the defense counsel and the Court remained silent. And, to cap matters, the judge himself repeated the reference to Occoquon in the presence of the jury both during the trial, Tr. 27, and in his instructions to the jury, Tr. 66. On neither of those occasions did the judge take adequate precautions as to the possible prejudicial effect on the jury.

Simply striking the one answer and the one question was not enough. It has been held that merely telling the jury, at the suggestion of the prosecutor, to "disregard the last statement" is inadequate in the absence of a sufficient instruction. *United States* v. *Tomaiolo*, 249 F. 2d 683, 695 (C.A. 2). By the same token, the judicial statement here that the answer or the question "may be stricken," Tr. 12, 27, is inadequate in the absence of sufficient instructions. But not even that inadequate protection was afforded as to the witness' later reiteration of the prejudicial fact. Tr. 30.

The instruction to the jury on this matter was totally inadequate. Tr. 66. The judge merely told the jury that the fact that the petitioner and the witness had met at Occoquon did not permit an inference of guilt of the petitioner, that it was to be "considered only in as far as it affects his (the complaining witness') credibility as a witness." Tr. 66. Nowhere was there any command to the jury, or even a suggestion, to disregard the Occoquon references completely. There was nothing like the judicial direction in *United States* v. *Curzio*, 179 F. 2d 380, 381 (C.A. 3), "to brush it from your minds, because it has nothing to do with this case," a direction there repeated [fol. 95] in the instructions that "there is no evidence in this case that Mr. Curzio has a police record or that he has ever been convicted of any crime before, so wipe that out of your minds completely."

Nor did the judge here do what the trial judge did in *United States* v. *Stromberg*, 268 F. 2d 256, 269 (C.A. 2), and direct the jury "to pay no attention to that remark in any way . . . to disregard it completely." See also *Marsh* v. *United States*, 82 F. 2d 703, 704 (C.A. 3). In *United States* v. *Apuzzo*, 245 F. 2d 416, 420, note 4 (C.A. 2), over a strong dissent, the trial judge who himself

had indeed the improper testimony was held to have overcome the error only by promptly telling the jury that the prejudicial facts "ought not to have been brought out . . . you are to disregard anything you heard . . . blame me for anything that occurred in that respect" and by later instructing the jury that "any testimony as to any previous arrest must be disregarded as having no probative value as to the guilt or innocence of the defendant."

Here there was nothing but an unexplained striking of some of the prejudicial remarks, a striking that was devoid of any simultaneous warning to the jury to disregard the remarks. And some of the remarks were not stricken. By the end of the trial, before the instructions, the jury had firmly implanted in its mind that the petitioner had a prior criminal record. Nothing the court had done served to dismiss that fact from the jury's mind. In these circumstances, a short statement of two sentences in the instructions to disregard the prejudicial fact in determining guilt but to consider that fact in assessing the credibility of the complaining witness falls abysmally short of the judicial action essential to preserve the fairness of the trial.

[fol. 96] D. *This error was plain, substantial and reversible, even in the absence of objection by petitioner's counsel.* The references to petitioner's past criminal record were so flagrant and so prejudicial as to call for correction by this Court and a reversal of the conviction pursuant to Rule 52(a) of the Federal Rules of Criminal Procedure. As in *United States* v. *Modern Reed & Rattan Co.*, 159 F. 2d 656, 658 (C.A. 2), this Court should not "fail to notice a plain error so far reaching because no objection was taken." And compare *Surratt* v. *United States*, 269 F. 2d 240, 241 (App. D.C.). The ruling in *United States* v. *James*, 208 F. 2d 124, 125 (C.A. 2), is particularly pertinent in this connection:

> "The effect of the introduction of this testimony was too clearly to show a proclivity to commit crime and thus blacken, to his prejudice, the character of the appellant, who did not by testifying make that an

issue, to permit his erroneous admission of it to pass as harmless error."

Moreover, the only witness to identify petitioner as a participant in the crime was the complaining witness. Since it was made plain that this witness also had a criminal record, his testimony may have been substantially discredited in the eyes of the jury. And conviction of petitioner conceivably could have rested in large part upon the impression of petitioner gained by the jury during the trial as to his past criminal proclivities. By the time the instructions were given, that prejudicial factor may have become so dominant that far more than the off-hand direction to disregard the criminal record in assessing guilt may have been necessary. The inadmissible testimony may thus have been not only prejudicial but pivotal in a close case such as this. See *United States* v. *Tramaglino*, 197 F. 2d 928, 932 (C.A. 2).

It is submitted, therefore, that a substantial question [fol. 97] warranting full review is inescapably presented by the record in this case.

II. *Was the trial judge properly assigned to conduct the trial in this case?*

A second substantial question presented by this record grows out of the fact that the presiding judge, Judge Joseph R. Jackson, was a retired member of the Court of Customs and Patent Appeals acting on assignment for the year 1960 to the United States District Court for the District of Columbia. Serious constitutional questions as to the validity of that assignment and as to the power of Judge Jackson to preside at this trial are thereby raised. More particularly, the following considerations are involved:

A. *The legislative nature of the Court of Customs and Patent Appeals.* Judge Jackson retired from the Court of Customs and Patent Appeals as of April 1, 1952. See 193 F. 2d XV. As of that time there can be no question but that the said court was very plainly "a legislative and not a constitutional court." *Ex parte Bakelite Corp.*, 279 U.S. 438, 459. It was a court created solely to determine

"matters arising between the government and others in the executive administration and application of the customs laws," and its functions included "nothing which inherently or necessarily requires judicial determination." *Ibid.*, 458. See *Katz*, Federal Legislative Courts, 43 Harv. L. Rev. 894.[3]

True, Congress in 1958 sought to declare that court as one "established under Article III of the Constitution of the United States." 72 Stat. 848, 28 U.S.C.A. 211. What the effect is of such a declaration need not here be explored. The important fact, and one only emphasized by the 1958 amendment, is that as of 1952 and earlier, [fol. 98] the Court of Customs and Patent Appeals was plainly a legislative and not a constitutional court. The 1958 amendment can neither add to nor detract from the status of Judge Jackson as of the time of his retirement on April 1, 1952, or later.

The conclusion seems to follow that Judge Jackson was never nominated or confirmed for any position other than that of a judge on a legislative court.

B. *The constitutional nature of the United States District Court for the District of Columbia.* On the other hand, the District Court below is very plainly one of the "constitutional courts of the United States, ordained and established under Art. 3 of the Constitution; that the judges of these courts hold their offices during good behavior, and that their compensation cannot, under the Constitution, be diminished during their continuance in office." *O'Donoghue v. United States*, 289 U.S. 516, 551. In addition, certain administrative or non-judicial functions may constitutionally be given the court below, making it something of a hybrid court from the constitutional viewpoint. Such non-judicial functions grow out of the power of Congress to legislate for the District of Columbia. See 1 Moore, Federal Practice, Sec. 0.4(4), page 72 (2d ed.). But the basic fact remains that it is essentially and primarily a constitutional court, the judges of whom are nominated, confirmed and vested with authority for

[3] See discussion of this matter by this Court in *Eastern States Petroleum Corp. v. Rogers*, No. 15109, decided May 12, 1960.

purposes of exercising the judicial power of the United States under Article III of the Constitution.

C. *The statutory basis of Judge Jackson's assignment.* There can be no doubt, moreover, as to the purported *statutory* authority for the assignment of a retired member of the Court of Customs and Patent Appeals to the District Court below. Under 72 Stat. 849, 28 U.S.C.A. 294, as amended in 1958, and even before, a retired judge [fol. 99] of the former court can be designated and assigned to the court below. For purposes of that statute, a retired judge of the Court of Customs and Patent Appeals is a "retired judge of the United States."

D. *The constitutional question as to the validity of the assignment.* The ultimate question thus is whether a designation and assignment to the court below of a judge who retired in 1952 from the Court of Customs and Patent Appeals can *constitutionally* be made so as to authorize such a judge to exercise the judicial powers of the court below. Or, can 72 Stat. 849, 28 U.S.C.A. 294, constitutionally be utilized to effect such an assignment?

The answer to that question is both unclear and significant in terms of petitioner's right to be tried by a tribunal properly constituted. See *United States* v. *American-Foreign SS. Corp.*, 363 U.S. 685, as to the standing of a litigant to raise such an issue. It is a right which is truly significant and essential to the preservation of basic procedural guarantees. As the Supreme Court emphasized in *Toth* v. *Quarles*, 350 U.S. 11, 15-16, Article III courts are established "to try cases and controversies between individuals and between individuals and the Government. This includes trial of criminal cases. These courts are presided over by judges appointed for life, subject only to removal by impeachment. Their compensation cannot be diminished during their continuance in office. The provisions of Article III were designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government."

In other words, can Congress authorize the trial of an individual accused of crime—whether that crime be outlawed by the District Code or the United States Code—by

[fol. 100] a court consisting of any judge other than one who originally was vested with authority to sit on an Article III court? Could Congress, for example, authorize a retired Tax Court judge to be assigned to the court below?

The Supreme Court in *Ex parte Bakelite Corp.*, 279 U.S. 438, 460, implied that there may be "constitutional obstacles to assigning judges of constitutional courts to legislative courts." Equally true, and perhaps more so, there may be constitutional objections to assigning a retired legislative court judge to a constitutional court, particularly in order to exercise a judicial function. Such a retired judge may not have the constitutional status and freedom which only an Article III court judge can have.

Precisely those doubts have been adverted to in 1 Moore, Federal Practice, Sec. 0.4(1), page 60, note 34 (2d ed.), where it is noted that "Doubt as to the constitutionality of assigning judges from constitutional to legislative courts and vice versa was a reason Congress assigned for classifying the Court of Claims and Customs Court as constitutional courts." And see Note, 69 Harv. L. Rev. 760, casting doubt on the propriety of the assignment of a territorial court judge from Hawaii to the Court of Appeals for the Ninth Circuit in *Irish* v. *United States*, 225 F. 2d 3.

This problem, as indicated, is not easy of solution. See the diversity of opinion as to a related matter in *National Mutual Insurance Co.* v. *Tidewater Transfer Co., Inc.*, 337 U.S. 582. But enough has been indicated to show that the problem is an important one inescapably presented by this case. It deserves full review and consideration by this Court, after the parties have had opportunity to explore and brief the manifold facets.

[fol. 101] Conclusion

For the foregoing reasons, petitioner should be granted leave to prosecute his appeal *in forma pauperis*. Petitioner's good faith has been more than adequately established "by the presentation of any issue that is not plainly

frivolous" so as to survive dismissal in the case of an non-indigent litigant. *Ellis v. United States*, 356 U.S. 674.

Respectfully submitted,

s/ Eugene Gressman
EUGENE GRESSMAN
1701 K Street, N.W.
Washington 6, D. C.
Counsel for Petitioner
appointed by this Court.

August 31, 1960

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 102] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Misc. 1481

[Title omitted]

OPPOSITION TO MEMORANDUM IN SUPPORT OF PETITION FOR LEAVE TO PROSECUTE AN APPEAL IN FORMA PAUPERIS—
Filed September 19, 1960

Comes now respondent by its attorney, the United States Attorney, and makes this opposition to the petition for leave to prosecute an appeal in forma pauperis.

The memorandum filed by appointed counsel asserts two grounds in support of the petition. One relates to the references that the complaining witness had known appellant at Occoquon. The first reference, made in response to a prosecution question, was stricken on the prosecution's motion. The second reference was contained in a question asked by defense counsel. It, too, was stricken on the Government's motion. But defense counsel resisted, stating "Your Honor, I believe I have a right to ask where he knew this man." In response to this argument, the court made the third reference; and the complaining witness then volunteered the fourth. (Mem. 6.) Accordingly, defense counsel was himself in great measure responsible for the references. In these circumstances, they cannot constitute the plain error necessary for review in the absence of objection. Rule 52(b), Federal Rules of Criminal Procedure. Not only did defense counsel make no objection to the references, he also did not object to the court's instruction that they could be considered by the jury only insofar as they bore upon the credibility of the complaining witness. What [fol. 103] ever difference there may be between this instruction and one that the references could not be considered with respect to appellant is too insubstantial to overcome the absence of objection. Rule 30, Federal Rules of Criminal Procedure.

Second, the memorandum questions the constitutionality of Judge Jackson's assignment to the District Court. The premise of the argument is that Judge Jackson retired from the Court of Customs and Patent Appeals when it was a legislative court and that the 1958 legislation (28 U.S.C. § 211) making it an Article III court "can neither add to nor detract from the status of Judge Jackson as of the time of his retirement on April 1, 1952, or later" (Mem. 16). The difficulty with this premise is that upon retirement Judge Jackson had a status as a retired judge which the 1958 legislation could and did affect. Appointed counsel does not suggest that the judges sitting on the Court of Customs and Patent Appeals at the time of the 1958 legislation did not thereby become judges of an Article III court. Yet none of them was nominated or confirmed as a judge of an Article III court. Nor was any of them renominated or reconfirmed after the legislation was enacted. Just as the 1958 legislation made them active judges of an Article III court, it constituted Judge Jackson a retired judge of an Article III court. The premise of appointed counsel's argument thus falls and, with it, the conclusion that a substantial question is presented. Other questions raised in the petition but not in the memorandum are, as the memorandum notes, without merit (Mem. 7-8).

Wherefore, it is respectfully submitted the petition for leave to prosecute an appeal in forma pauperis be denied.

s/ Oliver Gasch (CWB)
OLIVER GASCH,
United States Attorney.

s/ Carl W. Belcher
CARL W. BELCHER,
Assistant United States Attorney.

s/ Stephen N. Shulman (CWB)
STEPHEN N. SHULMAN
Assistant United States Attorney.

[fol. 104] CERTIFICATE OF SERVICE
(omitted in printing)

[fol. 104] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1481

[Title omitted]

REPLY MEMORANDUM FOR PETITIONER
Filed September 19, 1960.

On behalf of the petitioner, this memorandum is filed in reply to the respondent's opposition to the petition for leave to prosecute an appeal *in forma pauperis*.

Respondent's opposition consists solely of a denial of the merits of the two questions presented on behalf of petitioner. But such a denial is not relevant in the present posture of this case. The Supreme Court has warned against converting the "good faith" test of 28 U.S.C. § 1915 "into a requirement of a preliminary showing of any particular degree of merit." *Ellis* v. *United States*, 356 U.S. 674, 675. It is enough that the issues raised are plainly not frivolous so that the appeal would not be dismissed in the case of a nonindigent litigant.

Certainly the issues here raised do not fall into the plainly frivolous category. Whether the circumstances attending the revelation of petitioner's criminal record constitute plain error that can be corrected by this Court in the absence of objection is obviously a non-frivolous issue and respondent's simple denial of its merits cannot transform it into a frivolous one. So, too, the question as to the constitutionality of Judge Jackson's assignment is inherently a novel and substantial one, whatever re- [fol. 105] spondent may think of its merits. To put the matter simply, had this appeal been by a nonindigent defendant respondent could not have utilized its opposition herein to secure the dismissal of the appeal under Fed. Rules Crim. Proc. 39(a).

Even assuming some discussion of the merits is appropriate, however, respondent overlooks two vital facts in its opposition:

(1) The prosecutor knew or should have known, by virtue of the U.S. Commissioner's report, that the complaining witness had first met petitioner in prison. The major responsibility for setting into operation the chain of statements to that effect must fall on the prosecution. And the trial judge's failure to correct the impression thus gained by the jury and to give proper instructions may well be an error of the most egregious sort.

(2) This case does not involve the assignment of any judge of the Court of Customs and Patent Appeals sitting at the time of the 1958 legislation. Whether there are different considerations as to such judges does not have to be reached in this case. The only conceivable question here relates to a judge who retired long before the 1958 legislation. As to him the effect of that legislation on judges sitting in 1958 has no direct bearing. The constitutional question as to him is substantial and unanswered.

Respectfully submitted,

/s/ Eugene Gressman
1701 K Street, N.W.
Washington 6, D.C.
Counsel for Petitioner
appointed by this Court.

September 19, 1960.

[fol. 106] CERTIFICATE OF SERVICE
(omitted in printing)

[fol. 107] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1481

[Title omitted]

Before: Wilbur K. Miller, Bastian and Burger, Circuit Judges, in Chambers.

ORDER DENYING PETITION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—September 23, 1960

Upon consideration of the petition for leave to prosecute an appeal in forma pauperis and of the memoranda in support and the opposition, it is

ORDERED by the court that the petition for leave to prosecute an appeal in forma pauperis is denied.

Per Curiam.

[fol. 108] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 109] * * * *

[fol. 110] SUPREME COURT OF THE UNITED STATES

No. 480 Misc., October Term, 1960

BENNY LURK, PETITIONER

vs.

UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—January 23, 1961

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 669.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961 O 586105 9HR

FILE COPY

In forma pauperis
Petition not printed

No. 669

Office-Supreme Court, U.S.
FILED
MAR 23 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

BENNY LURK, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE ON BEHALF OF MARK COPPEDGE, JR., URGING REVERSAL

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Attorney for Mark Coppedge, Jr. (by appointment of the Court of Appeals)

March 23, 1961

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 669

BENNY LURK, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE ON BEHALF OF MARK COPPEDGE, JR., URGING REVERSAL[1]

QUESTIONS PRESENTED

This case presents questions which go to the very heart of the administration of criminal justice in *in forma pauperis* direct appeals from federal criminal

[1] Pursuant to Rule 42, paragraph 2, there have been lodged with the Clerk the written consents of Lurk's counsel and of the Solicitor General to the filing of this Brief Amicus Curiae.

convictions. The questions presented necessarily include the following:

1. Whether Lurk's direct appeal from a criminal conviction raised one or more "not plainly frivolous" issues entitling Lurk, despite his indigence, to have his appeal reviewed and determined on the merits by the Court of Appeals—particularly in the light of the standards so clearly enunciated by this Court in *Ellis* v. *United States*, 356 U.S. 674, and related cases; and whether the Court of Appeals, in denying leave to appeal *in forma pauperis*, failed and refused to follow the applicable *Ellis* standards.

2. Whether the Court of Appeals' refusal to allow Lurk to appeal *in forma pauperis*, and its refusal to determine his appeal on the merits, constitutes an unconstitutional (under the Due Process Clause) or an unlawful or an otherwise improper denial of justice or discrimination against indigent persons—particularly when the issues presented by Lurk's direct appeal were issues of a type which clearly would be reviewed and determined on the merits by the same Court of Appeals in a comparable case presented by a non-indigent appellant.

3. Whether the Court of Appeals' unlawful and unjust course of action in its handling of Lurk's appeal is cured because of the Government's assertion to this Court that the Court of Appeals actually did afford Lurk a review on the merits of his appeal—even though, contrary to such assertion by the Government, the Court of Appeals did just the opposite and acted on the basis of plainly incorrect

claims which the Government made to the Court of Appeals claiming that Lurk's appeal raised no substantial question.

INTEREST OF AMICUS CURIAE

Mark Coppedge, Jr. is in a situation comparable to Lurk's. Indeed, if any difference exists between the two cases, the difference is that the substantial questions raised by Coppedge's direct appeal were far more numerous and hence the error of the Court of Appeals in refusing Coppedge leave to appeal *in forma pauperis* was even more egregious.

Coppedge now has pending in this Court a petition for certiorari to the Court of Appeals for the District of Columbia Circuit, No. 539 Misc., seeking reversal of the Court of Appeals' order denying him leave to appeal *in forma pauperis*. In Coppedge's case comparably to what was said in Lurk's, the Government represented to the Court of Appeals that the issues raised on direct appeal were "not sufficiently substantial for this Court of Appeals to grant an appeal *in forma pauperis*". In Coppedge's case as in Lurk's, such a claim was fantastic, particularly in the light of the standards this Court enunciated in *Ellis* and related cases.[2] In Coppedge's case as in Lurk's, the Court of Appeals ignored the applicable standards established by this Court's decisions, and denied leave to appeal *in forma pauperis*.

In Coppedge's case as in Lurk's, the Government's Brief in Opposition filed in this Court[3] did not make

[2] The Appendix to this Brief Amicus Curiae lists the substantial questions—each of them "not plainly frivolous"—which are raised in Coppedge's appeal.

[3] Not by the present Solicitor General, but by his predecessor.

the slightest suggestion of reiterating to this Court what the Government had told the Court of Appeals—namely, that the questions raised in the Court of Appeals were "not sufficiently substantial" to meet the *Ellis* standards. Having succeeded in the Court of Appeals, on this totally untenable ground, in persuading the Court of Appeals to refuse to hear and determine on the merits these direct appeals, the Government's Briefs in Opposition—in Coppedge's case as well as in Lurk's—then came in to tell this Court that in the Court of Appeals the appeals really had been fully considered and determined on the merits already.

ARGUMENT

The fair and just handling of *in forma pauperis* cases constitutes one of the major problems confronting the courts in the administration of federal criminal justice. This is particularly true within the District of Columbia Circuit, where the *in forma pauperis* business of the courts is especially heavy.

In the effort to provide all the federal courts with clear and unequivocal guidance as to the standards applicable to allowance of *in forma pauperis* appeals, this Court held in *Ellis* v. *United States*, 356 U.S. 674, 674-675, that:

> "The only statutory requirement for the allowance of an indigent's appeal is the applicant's 'good faith'. 28 U.S.C. § 1915. In the absence of some evident improper motive, the applicant's good faith is established by the presentation of any issue that is not plainly frivolous. *Farley* v. *United States*, 354 U.S. 521. The good-faith test must not be converted into a requirement of a preliminary showing of any particular degree of merit. Unless the issues raised are so frivolous that the appeal

would be dismissed in the case of a nonindigent litigant, Fed. Rules Crim. Proc. 39(a), the request of an indigent for leave to appeal *in forma pauperis* must be allowed."

In far too many cases the teachings of *Ellis*, instead of finding a sympathetic reception in the District of Columbia Circuit, have met with outright rejection. Time and again, as it did in *Ellis*, this Court has found it necessary and appropriate to take corrective action and unanimously reverse the District of Columbia Circuit, so that the Court of Appeals would be required by this Court's specific direction to hear and determine on the merits an *in forma pauperis* criminal appeal. *Edwards* v. *United States*, 355 U.S. 36; *Hill* v. *United States*, 356 U.S. 704; *Cash* v. *United States*, 357 U.S. 219; *Hansford* v. *United States*, 357 U.S. 578; *Smith* v. *United States*, 358 U.S. 281; *Smith* v. *United States*, 361 U.S. 38; *McAbee* v. *United States*, 361 U.S. 537; compare *Willis* v. *United States*, 362 U.S. 216. In every one of these cases the District of Columbia Court of Appeals had cut off an indigent appellant from having his appeal heard and determined on the merits—just as it has done with Lurk and Coppedge—and in every instance this Court reversed.

The fact that so many reversals have been necessary—and that despite them the Court of Appeals in *Lurk* and in *Coppedge* has continued on its erroneous course of conduct—is eloquent proof of the gross misconception which prevails in the District of Columbia Circuit concerning the applicable legal standards on this subject. The Court of Appeals has persisted in applying its own views as to the governing standards, despite the wide gap which has been shown to exist between its views and the unanimous views of this

Court. In this area the District of Columbia Court of Appeals repeatedly has manifested a propensity to differ rather than defer.

If Lurk or Coppedge had been non-indigent appellants, their appeals would in fact have been heard and determined on the merits by the Court of Appeals. For example, it is understood that there are very few (if any) cases in recent years where the District of Columbia Court of Appeals dismissed as frivolous a direct criminal appeal brought to it on a paid basis by a non-indigent appellant, whereas during the fiscal year 1960 alone there were about 30 direct criminal appeals by indigent appellants in which the District of Columbia Court of Appeals denied leave to proceed *in forma pauperis*. No principles of natural selection—except those fostered by basically discriminatory practices—would account for a situation in which indigent appellants so frequently are held to be presenting frivolous appeals from criminal convictions but appellants able to pay their way are never (or virtually never) held to be doing so.

Indeed, anyone who reads the month-by-month output of opinions of the District of Columbia Court of Appeals in non-indigent criminal cases would have no doubt that Lurk's and Coppedge's appeals, had they come from non-indigent appellants, would have been fully heard and determined on the merits. Even a casual inspection will show that the Court of Appeals' opinions in its non-indigent criminal appeals are filled with appellate determinations on the merits of issues far less substantial than the issues Lurk and Coppedge tendered.

These circumstances emphasize the gravity of the unlawful and improper discrimination being practiced

against Lurk and against Coppedge because of their indigence. This is discrimination of the type which the Fourteenth Amendment prohibits the States from practicing. *Griffin* v. *Illinois*, 351 U.S. 12; *Eskridge* v. *Washington State Board*, 357 U.S. 214; *Ross* v. *Schneckloth*, 357 U.S. 575; *Burns* v. *Ohio*, 360 U.S. 252; *Douglas* v. *Green*, 363 U.S. 192; *McCrary* v. *Indiana*, 364 U.S. 277. "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. . . . [A]t all stages of the proceedings the Due Process and Equal Protection Clauses [of the Fourteenth Amendment] protect persons like petitioners from invidious discriminations." *Griffin* v. *Illinois*, supra, 351 U.S. at 18. This type of discrimination is at least equally violative of the Fifth Amendment's Due Process Clause, and at least equally violative of the entire spirit of fairness and equality upon which our judicial institutions are founded.

The Court of Appeals has inflicted on Lurk and on Coppedge because of their indigence a denial of justice which should be made impossible under a Constitution whose Preamble recognizes the great purposes of our free society to "establish Justice" and to "secure the Blessings of Liberty". The poor as well as the rich are entitled to have their criminal appeals fully heard and determined on the merits—at least when issues "not plainly frivolous" are raised by the appeal. In administration of federal criminal justice there is no room for discriminatory procedures which would relegate the indigent to a kind of second-class citizenship. Indigent appellants must not be made beggars for the

justice which every non-indigent appellant can obtain from the Court of Appeals as a matter of regular course.

A word should be added concerning the Brief in Opposition which the Government filed in this Court in *Coppedge*, comparable to what it said in *Lurk*. There the Government took the wholly spurious position that the appeal had "in effect already been granted and considered" by the Court of Appeals and "in effect the case was presented to the court below on its merits and was presumably disposed of on that basis". The simple answer to this is that plainly it is not so. No amount of misdescription by the Government can alter the fact that in both cases the Court of Appeals has denied, and not granted, an appellate review of the merits. The Government tendered its strange assertion to this Court despite all the facts: the Court of Appeals did not order that leave to appeal be granted, but instead ordered that such leave be denied; the Court of Appeals did not order the records in the cases to be transmitted to it from the District Court for review; the Court of Appeals did not allow the cases to be briefed on the merits; the Court of Appeals did not allow the cases to be orally argued on the merits, or even otherwise; the Court of Appeals did not render any opinion or order on the merits; the Court of Appeals did not express any views whatever on the merits of any of the issues raised; the Court of Appeals did not say or show that it had given any particular consideration to any of the issues raised; and the Court of Appeals did not in any other manner purport to give the cases full appellate review.

The Court of Appeals and the Government have alike embarked on courses of action which would

scuttle *Ellis* and would defeat the great principles of Equal Justice under Law. This cannot be accomplished as long as this Court sits.

CONCLUSION

The Court of Appeals has flagrantly departed from applicable legal standards. Unless this Court should decide to make its own full determination on the merits of the issues raised by Lurk's appeal, the case should be remanded to the Court of Appeals with instructions to that Court to give a full and prompt appellate review on the merits.

Respectfully submitted,

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March 23, 1961

APPENDIX

Substantial Questions, Each of Them "Not Plainly Frivolous", Presented by Coppedge's Appeal

1. The group of substantial questions presented as to the validity of the indictment:

   A. Whether the indictment is open to attack on the ground that the grand jury based its action on important testimony shown before the trial to have been false and perjured.

   B. Whether an indictment based on substantial false and perjured testimony is automatically salvaged by the fact that "other competent evidence" may have also been before the grand jury.

   C. Whether the grand jury transcript should have been made available to defense counsel as demanded.

   D. Whether in any event the District Court erred in determining that there was other competent evidence before the grand jury sufficient to support the indictment.

   E. Whether in any event the District Court, before determining that the indictment should be upheld, should have made a factual inquiry into whether government agents were responsible for inducing false and perjured testimony by Clarence Thompkins for presentation to the grand jury.

2. The substantial questions presented as to Judge Holtzoff's summary denial of motions that he should disqualify himself.

3. The substantial questions presented as to prejudice resulting from prosecution's use of testimony previously given at the first trial by the co-defendant Artis, who was unavailable as a witness at the second trial:

   A. Whether Judge Holtzoff erroneously excluded evidence showing that Artis, subsequent to the first trial, had entirely retracted his testimony implicating Coppedge in the offenses.

   B. Whether Judge Holtzoff erroneously failed and refused to inform the jury of the deficiencies and

weaknesses he himself had noted in Artis' testimony at the first trial.

C. Whether the trial court's failure to require the Government to produce the original of a statement in its possession, signed by Artis, was error and in violation of the Jencks Act, 18 U.S.C. § 3500.

D. Whether errors were committed in receiving the rebuttal testimony of FBI Agent Darragh on the Artis matter.

E. Whether under the unusual circumstances of this case the first-trial testimony of Artis should have been entirely excluded.

4. The substantial question presented as to whether corroboration should be required in the District of Columbia to support a conviction based on accomplice testimony.

5. The substantial question presented as to whether the prosecutor's summation was prejudicial to a fair trial and unfairly vouched for veracity of Government witnesses.

6. The substantial question whether the charge was defective for reasons which the Court of Appeals, in *Barry* v. *United States*, decided January 12, 1961, held to constitute plain error requiring reversal.

---

* The Court of Appeals' decision in *Barry* occurred subsequent to the filing of Coppedge's petition for certiorari; accordingly, this substantial question has not yet been presented to the Court of Appeals, but was raised in the Reply filed in this Court on January 18, 1961, and will be availed of in the Court of Appeals if Coppedge's case is remanded to that Court for a briefing and determination of the appeal on the merits.

FILE COPY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 669

BENNY LUCK,

Petitioner,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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March 28, 1961

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 669

BENNY LURK,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

Opinion Below

The Court of Appeals for the District of Columbia Circuit rendered no opinion. It merely entered an order, R. 34, stating that upon consideration of the petition for leave to prosecute an appeal *in forma pauperis* and of the memoranda in support and the opposition "the petition for leave to prosecute an appeal *in forma pauperis* is denied."

Jurisdiction

The judgment of the Court of Appeals was entered on September 23, 1960, R. 34, and the petition for a writ of certiorari was filed on October 21, 1960. The petition, to-

gether with the motion for leave to proceed *in forma pauperis*, was granted on January 23, 1961. R. 35; 365 U.S. 802. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Questions Presented

1. Whether the Court of Appeals, in denying petitioner leave to prosecute an appeal *in forma pauperis*, has applied 28 U.S.C. §1915(a) in a manner inconsistent with the standards set forth in *Ellis v. United States*, 356 U.S. 674.

2. Whether allegations (1) that references at the trial to petitioner's past criminal record constituted plain reversible error, and (2) that the assignment of a retired judge of the Court of Customs and Patent Appeals to the trial of a criminal case raises serious constitutional issues, constitute "not plainly frivolous" issues so as to require the allowance of an appeal from the conviction *in forma pauperis*.*

Constitutional Provisions and Statutes Involved

Section 1915, Title 28, United States Code:

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

* The Court may deem it appropriate to decide the merits of at least the second of the two allegations, relating to the constitutionality of the trial judge's assignment, at this juncture.

An appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith.

* * * * * *

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

* * * * * *

Section 211 as amended, Title 28, United States Code:

The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record known as the United States Court of Customs and Patent Appeals. Such court is hereby declared to be a court established under article III of the Constitution of the United States.

Constitution of the United States, Article III, Section 1:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Statement

Petitioner was indicted, tried and found guilty in the United States District Court for the District of Columbia on the charge that he had stolen from one Charles C. Edgeworth certain property, including cash, of the value of about $58.31, in violation of 22 D.C. Code §2901.[1] Following the jury trial, petitioner was duly sentenced to a prison term of not less than 4 years and 9 months and of not more than 14 years and 3 months. R. 18.

The trial was conducted on March 22, 1960, by Judge Joseph R. Jackson, R. 1, a retired member of the Court of Customs and Patent Appeals, see 193 F. 2d XV, acting on assignment for the year 1960 to the United States District Court for the District of Columbia. That assignment, a copy of which was filed in the office of the clerk of the District Court on December 8, 1959, reads as follows:

> DESIGNATION OF A RETIRED JUDGE OF THE COURT OF CUSTOMS AND PATENT APPEALS TO SERVE AS A DISTRICT JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
>
> The Chief Judge of the United States Court of Appeals for the District of Columbia Circuit having certified that there is a necessity for the designation and assignment of a retired judge on the Roster of Senior Judges to serve as a district judge of the United States District Court for the District of Columbia during the

---

[1] "Whoever by force or violence, whether against resistance or by putting in fear, shall take from the person or immediate actual possession of another anything of value is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years."

period beginning January 1, 1960, and ending December 31, 1960; and the Honorable Joseph R. Jackson, Retired Judge of the Court of Customs and Patent Appeals, whose name appears upon the Roster of Senior Judges as available for duty from time to time in the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia, having expressed his willingness to undertake the performance of such judicial duties beginning January 1, 1960, and ending December 31, 1960;

Now, THEREFORE, pursuant to the authority vested in me by Title 28, United States Code, Sec. 294(d), I do hereby designate and assign the Honorable Joseph R. Jackson to serve as a district judge of the United States District Court for the District of Columbia and discharge the official duties thereof beginning January 1, 1960, and ending December 31, 1960, and for such further time as may be required to complete unfinished business.

/s/ Earl Warren
Chief Justice of the United States

Dated: Dec. 7, 1959

A similar designation of Judge Jackson to serve as a judge of the District Court from January 1 to December 31, 1961, has been signed by the Chief Justice and filed in the District Court.

Petitioner, who had been represented at the trial by a court-appointed counsel, filed a *pro se* motion for leave to appeal *in forma pauperis*. This motion was denied by Judge Jackson "as plainly frivolous and not made in good faith." R. 18. Petitioner thereupon filed a *pro se* petition in the Court of Appeals for leave to appeal *in forma pau-*

peris. The undersigned counsel was appointed by the Court of Appeals to represent the petitioner and to file a memorandum in support of the petition. R. 9. Counsel thereafter filed a motion for production of the trial transcript. R. 10. Over the objection of the United States, this motion was granted and a transcript was ordered prepared at the expense of the United States and furnished to petitioner. R. 12. That transcript is part of the certified record before this Court.

On August 31, 1960, counsel filed on behalf of petitioner a memorandum in support of the petition for leave to prosecute an appeal *in forma pauperis*. R. 13-29. The United States filed a brief opposition to that memorandum on September 16. R. 30-31. And on September 19, petitioner's counsel filed a short reply memorandum. R. 32-33. Based upon the foregoing memoranda and opposition and without hearing any oral argument, the Court of Appeals on September 23, 1960, ordered "that the petition for leave to prosecute an appeal *in forma pauperis* is denied." R. 34. No opinion was written. The panel of the court that took such action was composed of Chief Judge Wilbur K. Miller and Judges Bastian and Burger. R. 34.

As indicated in the transcript of the trial on file with the Clerk of this Court, this case involved an alleged robbery of one Charles C. Edgeworth by two or more individuals in a Washington, D. C., restaurant. Only the petitioner was identified and tried. A detailed summary of the evidence at the trial is to be found in the memorandum submitted on behalf of the petitioner in the court below and reproduced in the printed record before this Court. R. 14-16. Suffice it here to say that the prosecution witnesses were Edgeworth (who testified as to the events surrounding the robbery and petitioner's subsequent arrest), a restaurant waitress (who testified that she saw someone rob Edge-

worth); and two police officers (who testified briefly as to the events leading to petitioner's arrest). The petitioner did not take the stand himself, counsel expressly waiving the right to do so, and no witnesses were presented on his behalf.

For present purposes the following colloquies and statements at the trial are to be noted:

(*Direct examination of Edgeworth by Assistant United States Attorney*, R. 2-3.)

Q. Now, Mr. Edgeworth, have you known the defendant prior to this day, December 14, 1959?

A. I didn't know his name, but I knew his face.

Q. You had seen him before, correct?

A. Yes, sir.

Q. Where had you seen him?

A. In Occoquon.[2]

Mr. Warner: I think we should strike that answer, Your Honor, I didn't realize that was the case.

The Court: It may be stricken.

* * * * *

(*Cross-examination of Edgeworth by petitioner's appointed counsel*, R. 3.)

Q. And what did you do at headquarters?

A. I described the man to them and told them what happened.

Q. And you told them that you knew this man; is that correct?

---

[2] The references throughout the trial transcript are to "Occoquon". The correct spelling of that word is "Occoquan" and it refers to the Occoquan Workhouse, a well-known prison for District of Columbia prisoners.

A. I told them I knew his face but didn't know his name.

Q. I believe you mentioned that you knew this man at Occoquon; is that right?

Mr. Warner: I think that answer has been stricken from the record, Your Honor.

The Court: The question may be stricken.

Mr. Cole: Your Honor, I believe I have a right to ask where he knew this man.

The Court: If this man has a record all right. Why do you mention Occoquon?

Mr. Cole: Of course, we are not introducing his record at this time, but I think—

The Court: Why don't you ask him where he saw him first?

* * * * * *

(*Cross-examination of Edgeworth by petitioner's appointed counsel*, R. 5.)

Q. You have seen Benny Lurk other than those times?

A. Yes.

Q. I thought you just got through—

The Court: He told you yes, he saw him. Now pursue your question.

The Witness: Me and Benny done a year in Occoquon, that is why I knew him.

Q. What were you charged with?

A. Assault.

Q. You did a year at Occoquon?

A. That is right.

Q. You saw Benny there, you say?

A. Yes, I used to be the food adviser.

* * * * *

(*Closing argument by petitioner's appointed counsel*, R. 6.)

These are the facts as we have heard them from the stand from the mouth of the only witness who has identified Benny Lurk. And what kind of witness do we have? We have a witness who himself is a convicted criminal. I don't know why he identified Benny Lurk. He may have a grudge against him. He said he has known him for 4 or 5 years. And then we have this situation, over 6 weeks passes by and then suddenly one day Mr. Edgeworth, the complaining witness, sees Benny Lurk, the face that he never forgets, and he calls the police and they come. And they take Benny Lurk to headquarters.

* * * * *

(*Judge's charge to jury*, R. 6.)

The Court instructs you that you are to draw no inferences whatsoever as to the guilt of the defendant from the fact that the complaining witness, Mr. Edgeworth, testified that he and the defendant met at Occoquon.

Testimony by the complaining witness in that respect is to be considered only in as far as it affects his credibility as a witness.

The law does not compel any defendant to take the witness stand and testify. Therefore, no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of the defendant to testify. The defendant is under no obligation to testify when he is being tried.

* * * * *

In addition, a report on a pre-trial hearing before a United States Commissioner was part of the District Court

file and was available to the Government prosecutor at the time of the trial. R. 13-14. That report summarized the preliminary testimony of the complaining witness Edgeworth in the following manner (R. 13-14):

> "... on Dec. 14, 1959 while in 'Miss Jones' restaurant between 10 and 10:30 P.M., waiting for a carry out food order, the def. and another man came into the place; *that he knows the Def. because he served a year in Jail with the Def;* that the other man stuck a knife into him and said don't move; that while he was being held at knife point, the Def. went into his pockets and removed his money and also took his eyeglasses; that he was cut in the hand by the knife and the Def. and the other man ran out; that he went home and called the police" (Emphasis added).

Thus it should have been evident to the Government prosecutor, when he asked Edgeworth where he had first met petitioner, that Edgeworth would likely answer that they had first met in jail while both were serving time for criminal offenses.

Based upon the foregoing matters of record, counsel for petitioner submitted to the Court of Appeals a memorandum contending that two non-frivolous issues were present so as to entitle petitioner to pursue his appeal *in forma pauperis*.[3] R. 13-29. Those two issues were: (1) whether the references at the trial to petitioner's past criminal record and the failure of the trial judge to give proper admonishments to the jury respecting such references constituted plain reversible error, and (2) whether a retired legislative court

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[3] In counsel's opinion, the five questions submitted *pro se* by petitioner, R. 8-9, were either without merit or were subsumed under the first issue tendered by counsel relative to the references at the trial to petitioner's earlier criminal record. See R. 19, n. 1.

judge could constitutionally be assigned to preside over a criminal trial in an Article III court. No effort was made by counsel to explore or brief fully all aspects of these issues. His position simply was that the rule of *Ellis* v. *United States*, 356 U.S. 674, had been satisfied—that certain issues had been presented that were "not plainly frivolous" so that petitioner's request to appeal *in forma pauperis* "must be allowed." See R. 28-29.

In opposition, however, the United States contended that both issues lacked merit and substantiality. R. 30-31. But no attempt was made to demonstrate that these issues were frivolous within the meaning of the *Ellis* case. Indeed, that failure called forth a reply memorandum by petitioner's counsel, R. 32-33, pointing out that the denial of the merits of the issues was not relevant at this posture of the case, that the sole question now was whether these issues —regardless of their ultimate or seeming merit—were so frivolous in nature as to warrant dismissal had the appeal been brought by a non-indigent litigant.

On the basis of the foregoing memoranda and without hearing any oral argument, the Court of Appeals entered a summary order denying the petition for leave to prosecute an appeal *in forma pauperis*. No opinion was rendered.

The petition for a writ of certiorari was thereupon duly filed in this Court. In its brief opposing the petition, the United States contended (p. 5) that the Court of Appeals had, "in effect, granted and considered petitioner's appeal *in forma pauperis*, since it granted a transcript at government expense and the issues presented were briefed on the merits" so that the petition "should therefore be considered by this Court on the strength of the substantive issues presented." On that premise, the United States argued that

(1) the first contention as to the trial references to petitioner's past criminal record "is without merit", and (2) the contention as to the constitutionality of assigning Judge Jackson to the District Court to preside over a criminal trial was without substance since Congress in 1958 had declared the Court of Customs and Patent Appeals, from which Judge Jackson had retired, to be a constitutional court. No word was said in the brief of the United States as to either issue being frivolous in nature within the meaning of *Ellis* v. *United States*, 356 U.S. 674, so as to justify the denial below of leave to appeal *in forma pauperis*.

Summary of Argument

The Court of Appeals, in denying petitioner leave to appeal *in forma pauperis* in the light of the contention by the Government that the issues raised were without merit, contravened the rule of *Ellis* v. *United States*, 356 U.S. 674, that leave to appeal may be denied only if the issues raised are frivolous. The continued refusal of the Court of Appeals to recognize and apply the *Ellis* principle calls for an elaboration and further delineation of that principle.

In any event, two issues were raised on behalf of petitioner which could not be considered frivolous under the *Ellis* standard and hence leave to appeal should have been granted. These two issues were:

(1) Were the trial reference to petitioner's past criminal record so prejudicial as to warrant reversal of the conviction in the absence of objections at the trial, where petitioner did not take the stand? Were the instructions to the jury adequate? Precisely these types of questions were held to constitute non-frivolous issues in *Farley* v. *United States*, 354 U.S. 521, 522.

(2) Was it constitutional under Article III for Congress to seek to authorize, 28 U.S.C. §294(d), the Chief Justice of the United States to assign to the District Court of the United States for the District of Columbia a judge who had retired in 1952 from the Court of Customs and Patent Appeals? Was it enough to satisfy the Constitution that Congress in 1958 declared the Court of Customs and Patent Appeals to be a constitutional or Article III court in place of its previous status as a legislative court? Such constitutional questions are obviously substantial and unresolved. They cannot properly be termed frivolous.

As to the first issue, the non-frivolousness and indeed the substantiality are evident from even a cursory examination of its various facets. Here the prosecutor had available a report by the United States Commissioner showing that the complaining witness, if asked where he had met petitioner, would likely reply that they had served time together in prison. Yet the prosecutor asked a question that brought forth that reply. And the matter was subsequently referred to by the court-appointed defense counsel, the judge and the complaining witness—all without adequate admonitions to the jury to disregard this prejudicial evidence. In such a chain of circumstances, it is doubtful if it was enough for the judge merely to strike, rather cryptically, the first two references to the prior prison record and then charge the jury that it was not to draw any inferences of guilt from this evidence. Decisions of appellate courts firmly establish the possibility of error in these circumstances even where, as here, no objections to the evidence were made during the trial.

As to the second issue, the following propositions not only establish the non-frivolousness of the question but also demonstrate that a retired legislative court judge

cannot constitutionally preside over a criminal trial in an Article III Court:

(1) Petitioner, as a District of Columbia inhabitant, had a constitutional right to be tried for a felony crime before a judge possessing Article III judicial power. *O'Donoghue* v. *United States,* 289 U.S. 516, 540; *Toth* v. *Quarles,* 350 U.S. 11, 15. And petitioner, as a person convicted in a court presided over by a legislative court judge, has standing to raise this issue. See *United States* v. *American-Foreign SS. Corp.,* 363 U.S. 685.

(2) The challenge thus made must be in constitutional terms since the assignment statute, 28 U.S.C. §294(d), seems plainly to authorize the kind of assignment here in question.

(3) The United States District Court for the District of Columbia, while capable of exercising certain non-judicial powers, is primarily a constitutional or Article III court, exercising the Article III judicial power of the United States. *O'Donoghue* v. *United States,* 289 U.S. 516.

(4) The Court of Customs and Patent Appeals, on the other hand, has been determined by this Court to be a legislative court, exercising only such powers as could have been exercised by executive officers of the Government. *Ex parte Bakelite Corp.,* 279 U.S. 438; *Williams* v. *United States,* 289 U.S. 553. As a legislative court, it is "incapable of receiving" any of the Article III judicial power of the United States. And its judges are likewise incapable. Hence such judges cannot be assigned to perform Article III power.

(5) The 1958 effort of Congress, declaring the Court of Customs and Patent Appeals to be a constitutional court, was ineffectual to change the nature of that court. The

1958 amendment was premised on the continuation without change of the structure, organization and jurisdiction of this court; thus it did not pretend to add any powers to the court or its judges that could be described as Article III powers.

(6) In the absence of any addition of Article III powers to the court or its judges, Congress cannot change what this Court has definitively determined to be the legislative nature of the Court of Customs and Patent Appeals. Here, Judge Jackson was nominated and confirmed as a legislative court judge, performed legislative court duties for 14½ years, and then retired in 1952. Never was it thought that he had, by virtue of his appointment or service, any Article III powers. It is inconceivable that six years later Congress can change his status from that of a retired legislative court judge to a retired Article III court judge—all without attempting to alter or change the powers which he acquired as a member of the Court of Customs and Patent Appeals. Hence it must be concluded that the assignment here was not constitutionally authorized.

In the event that this Court deems it appropriate to resolve the aforesaid constitutional issue at this juncture, rather than remanding for a decision on that issue by the court below, a full discussion of the question is presented hereinafter.

But whatever the disposition to be made by this Court, the fact remains that, despite the Government's contention to the contrary, the petitioner was denied a full review of his conviction. And because two non-frivolous issues were presented on his behalf, the denial of the petition to appeal *in forma pauperis* was plain error by the court below.

ARGUMENT

The essence of this case, as it reaches this Court, is whether indigent prisoners are to be accorded the same appeal rights in the federal court system as are given to convicted individuals possessing resources to finance their own appeals.

The answer to that question should be obvious. As was stated in *Griffin* v. *Illinois*, 351 U.S. 12, 19, "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." Yet that simple principle has been repeatedly ignored by the Court of Appeals for the District of Columbia Circuit in passing upon applications to appeal *in forma pauperis* under 28 U.S.C. §1915(a) from criminal convictions. This case represents a particularly flagrant instance of this propensity to do violence to the principle of equality of appeal rights as between the poor and the pecunious.

I.

The Court of Appeals Misapplied 28 U.S.C. §1915(a) in Denying Petitioner Leave to Appeal in Forma Pauperis.

a. *The nature of the proceedings and judgment below*

In *Ellis* v. *United States*, 356 U.S. 674, this Court enunciated *per curiam* the controlling principles to guide the lower federal courts in treating petitions for leave to appeal *in forma pauperis* under 28 U.S.C. §1915(a):

> "The only statutory requirement for the allowance of an indigent's appeal is the applicant's 'good faith'. 28 U.S.C. §1915. In the absence of some evident im-

> proper motive, the applicant's good faith is established by the presentation of any issue that is not plainly frivolous. *Farley* v. *United States*, 354 U.S. 521. The good-faith test must not be converted into a requirement of a preliminary showing of any particular degree of merit. Unless the issues raised are so frivolous that the appeal would be dismissed in the case of a nonindigent litigant, Fed. Rules Crim. Proc. 39(a), the request of an indigent for leave to appeal *in forma pauperis* must be allowed."

Acting upon those principles, petitioner's court-appointed counsel sought to raise two issues of a non-frivolous nature, without attempting to brief them fully or to demonstrate their ultimate merit. The first of these issues involved the assertion that, since petitioner had not taken the stand, plain error may have been committed by the trial court by its failure to take proper corrective action relative to certain evidence concerning petitioner's prior criminal record. Precisely that type of issue was characterized by this Court in *Farley* v. *United States*, 354 U.S. 521, 522, as non-frivolous. And the second issue raised on behalf of petitioner concerned the constitutionality of assigning a retired legislative court judge to conduct a criminal trial in a constitutional or Article III court. Since that constitutional issue was both important and unresolved, its non-frivolous nature seemed beyond dispute.

The response of the United States to these two issues in the court below was solely to challenge their merit, not their frivolousness. The circumstances surrounding the questions and answers as to petitioner's past criminal record, said the Government (R. 30), were not such as to "constitute the plain error necessary for review in the absence of objection." And, after arguing that a retired legis-

lative court judge could under the peculiar statutory circumstances be assigned to try a criminal case in the District Court, the contention was made (R. 31) that "the premise of appointed counsel's argument falls and, with it, the conclusion that a substantial question is presented." In other words, since the issues were thought to lack merit the conclusion was drawn that they also lacked substantiality.

As was noted in the reply memorandum filed on behalf of the petitioner (R. 32), the Government's denial of the merits of these two issues was not relevant at this juncture. Under the *Ellis* ruling, 356 U.S. at 675, an *in forma pauperis* application need not make "a preliminary showing of any particular degree of merit." It is enough if the issues are non-frivolous. And significantly, the Government has not in terms argued that the two issues were frivolous.

Since the order of the court below denying leave to appeal *in forma pauperis* was by its terms based solely upon "consideration of the petition for leave to prosecute an appeal in forma pauperis and of the memoranda in support and the opposition" (R. 34), it is fair to interpret the order as approving, or at least as motivated by, that opposition by the Government. The court below did what the *Ellis* decision said it should not do. Like the Government, it converted the "good faith" test of 28 U.S.C. §1915 into a requirement of a preliminary showing of some degree of merit and insisted that there be substantiality to the questions presented. And because the court, following the Government's contention, apparently believed that these two issues lacked both merit and substance—and therefore were frivolous—petitioner was denied his right to appeal *in forma pauperis*. The error of the court in so holding is obvious.

b. *The Government's misdescription of the proceedings*

In its opposition to the petition for certiorari, the United States took the position (p. 5) that the court below had, "in effect, granted and considered petitioner's appeal *in forma pauperis*, since it granted a transcript at government expense and the issues presented were briefed on the merits." The argument was accordingly made that the petition to this Court should be considered "on the strength of the substantive issues presented."

Such a description of what "in effect" happened in the Court of Appeals is wholly at variance with the facts. While that court did order the transcript prepared at government expense, it did so on appointed counsel's motion (R. 10-11). And that motion was expressly premised (R. 11) on counsel's need for the transcript in order to determine if the appeal was frivolous and in order to fulfill counsel's duty under *Ellis* v. *United States*, 356 U.S. 674, to represent petitioner "in the role of an advocate." The court's order granting the transcript (R. 12) simply stated that an appeal *in forma pauperis* was allowed only "to the extent of having the transcript . . . prepared without costs . . ." The request for leave to appeal was never granted in any other manner and no indication was ever given that the merits of any issue raised were to be considered by the court.

Moreover, the Court of Appeals never ordered that the full record of proceedings in the District Court be brought before it—as would normally happen if the appeal were allowed. Petitioner's counsel made no effort to explore and brief fully all the aspects of the two issues which he raised. And the Government's response (R. 30-31) was even less elaborate. No oral argument was had before the court and no opinion or order was rendered which would indicate

that the court felt it was treating the case as submitted on the merits of the two issues.[4] The Court of Appeals simply ordered (R. 34) that "the petition for leave to prosecute an appeal in forma pauperis is denied."

Despite the Government's denial, the simple fact is that the Court of Appeals has denied petitioner full appellate review of his conviction. In denying that review, the court apparently followed the arguments presented on behalf of the United States and concluded—without the benefits of a full scale review—that the issues raised lacked either substance or merit. In so doing, as petitioner contends, the court acted contrary to the *Ellis* ruling. But even that error was not premised in theory or in fact upon the grant of full appellate review.

Indeed, if the Government's version of the events below were true, the error of the action of the Court of Appeals is compounded ten-fold. The simple standard set forth in the *Ellis* case forbids any "requirement of a preliminary showing of any particular degree of merit" as to issues raised on behalf of those seeking leave to appeal *in forma pauperis;* only the frivolousness of such issues is to be considered. But if, by the process of securing a transcript and arguing at sufficient length to demonstrate the non-frivolousness of the issues raised, an indigent prisoner is to be held to have had his appellate day in court, then all meaning has been drained from the *Ellis* case. And appellate counsel must then proceed at the risk of saying too much and thereby cutting off his client's right to full review on the merits. This would mean that counsel for rich appellants would have the right to proceed fully to brief.

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[4] The case at all times remained on the court's miscellaneous docket as No. 1481 and was never transferred to the regular appellate docket and renumbered, as would happen if the petition for leave to appeal had been granted.

and argue their cases orally, but counsel for indigent prisoners could be denied that right. The invalidity of that discrimination is plain.

The ultimate fact is that the Government's version of the proceedings below is at odds with what actually happened and is flatly contradicted by Section 1915 as interpreted by the *Ellis* case. It was reversible error for the court to consider the merits or substantiality of the issues under the guise of considering their frivolousness. But at least the court must be credited with an effort to comply with the *Ellis* standard, however misplaced that effort may have been. To suggest, as the Government has done, that the court abandoned all pretense of following the *Ellis* rule and gave petitioner a full appellate review is to suggest an even more egregious error. Never has it been thought that a petition for leave to appeal *in forma pauperis* and supporting memoranda could, without more, constitute full appellate review. Nothing in the language or purpose of Section 1915 makes such a result in any way tolerable.

c. *The need for elaboration of the Ellis rule*

The action of the court below in this case, as well as the position taken before that court and before this Court by the United States, clearly demonstrates the need for underscoring and elaborating the rule of the *Ellis* case. Time and again this Court has had to require the Court of Appeals for the District of Columbia to reconsider its actions in the light of *Ellis*. See *Hill* v. *United States*, 356 U.S. 704; *Cash* v. *United States*, 357 U.S. 219; *Hansford* v. *United States*, 357 U.S. 578; *Smith* v. *United States*, 358 U.S. 281; *Smith* v. *United States*, 361 U.S. 38; *McAbee* v. *United States*, 361 U.S. 537. Cf. *Willis* v. *United States*, 362 U.S. 216. And see *Coppedge* v. *United States*, now pending before this Court on petition for certiorari, No.

539 Misc., October Term, 1960. Apparently, then, not all of the judges of the court below have yet understood all of the implications and requirements of the *Ellis* rule in passing upon petitions for leave to appeal *in forma pauperis*.[5]

The experience of many of the counsel who have been called upon by the court below to represent petitioners seeking to appeal *in forma pauperis* has often been a frustrating one in terms of the *Ellis* rule. Far too frequently these appointed counsel are met by arguments by the United States that the issues they seek to raise are without "merit" or "substance." On other occasions, the answer may be that the issues are "frivolous" in the sense of being without merit or substance. The continuing number of *per curiam* orders denying leave to appeal, especially in those cases (such as the instant one) where the Government's argument has been in terms of "merit" or "substance", has created an uneasy feeling that the *Ellis* rule and the whole purpose of Section 1915(a) are being eroded.

The importance of this problem is not to be underestimated. The Court of Appeals for the District of Columbia is probably met with more requests for leave to appeal

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[5] See remarks of United States District Judge Albert A. Ridge of the Western District of Missouri, *The Indigent Defendant*, 24 F.R.D. 241, 247: "Because of the importance of those subjects, it is to be regretted that the Supreme Court did not spell out more clearly its philosophical approach to those matters in its *per curiam* opinions. Had it done so, the lower courts would have been given a clearer understanding of the procedural approach to the problem, and the equations now to be used in disposition of *in forma pauperis* appeals without being cast into a quandary. Irrespective of the lack of complete elucidation by the Supreme Court, if the pall of our dilemma is to be dispersed, it is apparent that the lower courts must ascertain what the philosophy of the Supreme Court is, upon which the Johnson and Farley cases are rested."

in forma pauperis than any other federal appellate court in the country. The criminal jurisdiction of the District of Columbia courts, covering both federal and local or District crimes, results in far more indigents seeking to appeal their convictions than is the case in any other federal judicial district. The sheer volume of these District of Columbia cases, therefore, has presented the problem in its most dramatic and continuing form—the problem of the proper standard to apply in passing upon petitions to appeal *in forma pauperis*. And it is a problem that apparently has sharply split the Court of Appeals, a split that continues up to the present day. Strongly held views have been expressed, some of which are at complete variance with this Court's ruling in the *Ellis* case. See, e.g., the various opinions in *Cash* v. *United States*, 261 F. 2d 731 (App. D. C.), certiorari granted and judgment vacated, 357 U.S. 219.

From the records in the clerk's office of the Court of Appeals, it appears that during the 1960 fiscal year (July 1, 1959, to June 30, 1960) about 43 *in forma pauperis* petitions were filed, seeking to appeal directly from criminal convictions.[8] Of these 43 petitions, 13 were granted and 30 denied. These statistics are in contrast to earlier ones compiled by Circuit Judge Bazelon in *Jones* v. *United States*, 266 F. 2d 924, 926 (App. D. C.). He there noted that from November 1957 up to about the time of his opinion (April 30, 1959), 47 *in forma pauperis* petitions for leave to appeal from criminal convictions had been filed; of those 47 petitions, 31 were granted. Ultimately, though,

[8] During the 1960 fiscal year, a total of about 240 *in forma pauperis* applications came before the Court of Appeals. Of those 240, about 180 arose on petitions for leave to appeal *in forma pauperis* after such leave had been denied by the District Court, and the other 60 were cases where such leave had been granted by the District Court. Out of the 180 petitions, which included habeas corpus matters, 13 were granted and 30 denied in cases of direct appeal from criminal convictions.

in most of the cases in which leave was granted the convictions were affirmed on the merits. Judge Bazelon then continued (266 F. 2d at 926-7):

> "But there are many meritorious appeals among them, and a substantial number result in reversals. If, because of the Supreme Court's Ellis decision, we are allowing more criminal appeals in forma pauperis, it is probable that these include a larger number of *meritorious* appeals.
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> "From September 1, 1957, through February 28, 1959, we decided 24 appeals in which we had granted leave to appeal in forma pauperis although the District Court had previously denied leave on the ground that the appeal lacked merit. *We reversed the convictions in 11 of these 24 cases.* In 6 of the other cases the convictions were affirmed by split decisions. Thus in 17 of the 24 cases at least one judge of this court thought the conviction should be reversed. In all 17 of these cases, the Government opposed the petitions for leave to appeal in forma pauperis.
>
> "A free society should be ready to assume the burden of infinitely more than 24 appeals to avert 11 miscarriages of justice. Concern for our docket should not attenuate the right of every indigent to point out, with the aid of counsel, what may prove to be errors. If time of bench and bar is spent in review of cases lacking in merit, it is the price we must pay for a system of justice that shields the poor man from 'invidious discriminations.' We cannot review the cases which prove to have merit without reviewing some which may not." [Emphasis in original.]

Such, then, is the nature and the measure of the problem in the Court of Appeals for the District of Columbia Circuit. See, generally, Annotation, 1 L. Ed. 2d 1964.

d. *The meaning and the thrust of the Ellis doctrine*

Since some elaboration of the *Ellis* doctrine seems in order, it is necessary to state just what the doctrine is. Section 1915(a) very simply says that an appeal may be taken *in forma pauperis* if taken in "good faith." And the *Ellis* case sought to interpret that "good faith" standard by establishing two criteria: (1) the absence of some evident improper motive; (2) the presentation of any issue that is not plainly frivolous.[7] The criteria of non-frivolousness was further refined to mean: (a) it is not the equivalent of a requirement of a preliminary showing of any degree of merit; (b) but it is the equivalent of the rule as to dismissal of frivolous prepaid appeals under Rule 39(a) of the Federal Rules of Criminal Procedure.

The problem becomes primarily one of putting some meat on the concept of frivolousness. To that end, several considerations are in order:

(1) The concept of frivolousness is *not* the equivalent of lack of merit or lack of substantiality in the questions presented. As Mr. Justice Frankfurter noted, in considering an application for bail, *Ward* v. *United States*, 76 S. Ct. 1063, 1 L. Ed. 2d 25, there is a qualitative difference between the concepts of "frivolous" and "lack of a substantial question." And, indeed, the Solicitor General has advised this Court in an earlier case, *Hill* v. *United States*, 356 U.S. 704,[8] that the United States agrees that there is such a

[7] Earlier expressions by this Court that frivolousness is the prime standard for weighing the issues presented in a petition filed under Section 1915 are to be found in *Johnson* v. *United States*, 352 U.S. 565, 566, and *Farley* v. *United States*, 354 U.S. 521, 522.

[8] Brief of the United States in opposition to the petition for certiorari in the *Hill* case, Misc. No. 287, October Term 1957, p. 7.

distinction and that "frivolity" is not to be confused with "lack of a substantial question."[9]

That the term "frivolous" is not to be equated to "without merit" is made strikingly clear in *Texas Co.* v. *Roos*, 93 F. 2d 380 (C.A. 5), and *United States* v. *Nudelman*, 207 F. 2d 109 (C.A. 3). In both cases the appellee moved to dismiss the appeal as frivolous. In the earlier case the Fifth Circuit stated, "We think the appeal is without merit, but are unable to say that it is frivolous or was taken only for delay." 93 F. 2d at 383. In the later case the Third Circuit said merely, "Such a motion cannot be granted since the appeal was directed to the merits." 207 F. 2d at 109. The court permitted the appellee to amend its motion to one for summary judgment of affirmance of the appeal and granted the motion.

The reasons are even clearer why these terms should not be equated in cases involving the grant or denial of leave to appeal *in forma pauperis*. With regard to what is a "substantial question," for the now outmoded purposes of determining whether to permit release of the applicant on bail pending review, under Federal Criminal Rule 46(a)(2) before its amendment, Mr. Justice Douglas, sitting as Circuit Justice, said in *Herzog* v. *United States*, 75 S. Ct. 349, 351, 99 L. Ed. 1299, 1301:

> "A question might seem substantial to one person and not to another. My years of experience on the Supreme Court with petitions for certiorari is en-

[9] In *Cash* v. *United States*, 261 F. 2d 731, 739-740 (App. D.C.), Circuit Judge Burger argued that "frivolous" was the equivalent of the lack of a question or issue "which has some substance or some merit, some scintilla of prospect of success." An appeal raising questions "which have *no* substance has no prospect of success" and is therefore without merit and "frivolous", and "malicious" and "not taken in good faith", he added. This Court's summary reversal of the *Cash* case, 357 U.S. 219, indicates disapproval of such statements.

> lightening in this regard. The practice is to grant those petitions on a vote of four Justices. Those who vote to deny the petition, either because they think the decision below was right or that the petition presents nothing substantial, often vote to reverse after oral argument. Further study of a problem often changes a vote. Further study may do more; it may indeed change the views of the majority of a court. It has happened over and again in the Supreme Court; and I am confident it also happens in other courts."

The same, of course, could be said of "frivolous," if interpreted to mean lack of a substantial question. It is upon the appeal which petitioner seeks to take that his case is to be determined on its merits; not upon his petition for leave to appeal.

(2) The concept of frivolousness is also *not* the equivalent of the petitioner having no "realistic chance of success were the appeal to be allowed." *Cash* v. *United States*, 261 F. 2d 731, 738 (App. D.C., per Prettyman, C.J.). The summary reversal of the *Cash* case by this Court and the remand of the case to the Court of Appeals for reconsideration in light of *Ellis* amply demonstrated this Court's dissatisfaction with any such equivalence. 357 U.S. 219.

To make one's right to appeal turn upon the "realistic chance of success were the appeal to be allowed" would be to indulge in a risky legal sport. The success or failure of an appeal frequently is determinable only after the written and oral arguments of the opposing parties have been fully developed and the court has then had an opportunity to bring its informed views to bear upon such matured issues. The make-up of a particular appellate panel is sometimes decisive as to the chances of an appeal. An unanticipated concession or admission by counsel during oral

argument on occasion may be determinative. See *Williams* v. *Georgia*, 349 U.S. 375, 381-2. It is, in other words, the relatively rare case, where, at a preliminary stage of the appeal process, it can properly and safely be said with certainty that the appeal has no chance whatever of success. And so frivolousness must mean something other than the absence of a realistic chance of success, in order for Section 1915(a) to have any substance.

(3) The reference in the *Ellis* opinion to Rule 39(a) of the Federal Rules of Criminal Procedure, relating to the dismissal of prepaid appeals, provides the real clue to the meaning of the term "frivolous." In the leading case under Rule 39(a), *United States* v. *Johnson*, 327 U.S. 106, 113, this Court ruled that a prepaid appeal should be dismissed as frivolous if the question raised on appeal "does not present a reviewable issue" within the jurisdiction of the appellate court. If an issue is reviewable, in other words, the appeal cannot be dismissed as frivolous even though the issue may ultimately be found to be without substance and even though the realistic chances of success seem slim.

If there is a "reviewable issue," then its presentation establishes the fact that the appeal is being prosecuted in good faith and is not frivolous. The right to appeal—and to have "not plainly frivolous" issues fully and fairly considered on their merits—belongs alike to the rich and the poor, to the good and the bad, to the innocent and the guilty, to the deserving and the meretricious. A "not plainly frivolous" issue includes any issue which an appellate court can conscientiously consider, or can conscientiously look into further, on appeal. It includes any issue which an appellate judge may feel would warrant some further or fuller exploration.

On the other hand, if the issue is undeniably outside the jurisdiction of the court, or if the issue asks only for a

review of facts as already found by a jury on the basis of incontrovertibly sufficient evidence, or if the issue is utterly incomprehensible, then the issue may be determined to be presented in bad faith, to be clearly non-reviewable, and hence to be frivolous.

If the issue is one that might conceivably be felt by even one appellate judge to warrant further exploration, this alone should normally indicate that the issue is reviewable and hence non-frivolous. Is it at all possible that the issue, if fully briefed and developed, would be considered seriously by one or more appellate judges?[10] Cf. opinions as Circuit Justices of Mr. Justice Harlan in *Roth* v. *United States*, 77 S.Ct. 17, 1 L. Ed. 2d 34; and of Mr. Justice Frankfurter in *Sklaroff* v. *Skeadds*, 76 S.Ct. 736, 100 L. Ed. 1524. In a particular case, the absence of even a scintilla of support in law or fact or jurisdiction, the absence of the slightest likelihood of serious consideration by any appellate judge, might all combine to sustain a finding that the appeal was frivolous and in bad faith. But short of this, the merits of the appeal should not be decided at the stage of the motion for leave to appeal.

Such, it is submitted, should be the real meaning of the *Ellis* rule. And tested by that rule, the presentation of the two issues in this case cannot, by any stretch of the imagination, be considered as frivolous or in bad faith.

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[10] "Thus grounds appearing 'frivolous' to one judge may constitute reversible error in the eyes of another. This is sometimes the case even within division of our own courts" Circuit Judge Bazelon in *Jones* v. *United States*, 266 F. 2d 924, 926, note 5 (App. D.C.). Moreover, as Judge Bazelon noted in note 4 of that opinion, 14 of 18 prepaid criminal appeals appearing in volumes 246 to 258 of Federal Reporter, Second Series, were affirmed by the Court of Appeals for the District of Columbia Circuit. Yet none of those 14 were dismissed as frivolous.

Indeed, it must be evident in the present case that the appeal should have been allowed *in forma pauperis* even if the applicable standards were to be deemed far more rigorous and hostile to indigent appellants. Even if "not plainly frivolous" were to be equated with "substantial"—which is clearly not a correct standard—and even if the measure of such substantiality were deemed to require a preliminary showing of some strong possibility of reversal on appeal—which is likewise not a correct standard—the presentation of the two issues in this case would still readily meet the test. There could be no rational definition of either "non-frivolous" or "substantial" which would disqualify this petitioner from the right to have his appeal *in forma pauperis* allowed, so that the issues raised on his behalf could be fully heard and determined on the merits.

The treatment which has been accorded to this petitioner by the Court of Appeals is a gross discrimination against him because of his indigence. All traces of such discrimination must be eliminated from the federal judicial system. Apparently this can be accomplished only by this Court's reiteration and amplification of its prior rulings.

II.

The Two Issues Raised on Behalf of Petitioner Were Non-Frivolous so as to Warrant an Appeal in Forma Pauperis.

The error of the Court of Appeals in denying petitioner leave to appeal *in forma pauperis* is further evidenced by an examination of the two issues which appointed counsel sought to raise on petitioner's behalf. Two issues were presented which, in the language of the *Ellis* case, were "not plainly frivolous" whatever might be their "particular degree of merit." Indeed, those issues were far more than

merely non-frivolous; they were, by any standard, substantial in nature. To say that these issues were so frivolous as to warrant dismissal of an appeal if brought by a non-indigent litigant is to render meaningless the right of this indigent petitioner to appeal pursuant to 28 U.S.C. §1915(a).

a. *The references to petitioner's past criminal record.*

Without attempting a full analysis or a demonstration of the ultimate merit of the issue, it is plain that the first question presented on behalf of the petitioner is of a non-frivolous nature. The substantiality of that question is at once evident from even a cursory examination of its various facets.

Axiomatic, of course, is the proposition that, where a criminal defendant does not take the stand, evidence as to his past criminal record or as to his unsavory character is inadmissible. See *Michelson* v. *United States*, 335 U.S. 469, 475; *Boyd* v. *United States*, 142 U.S. 450. Here the trial record contains repeated references by the complaining witness and others to the effect that petitioner had previously served a term at Occoquan Workhouse—a well-known jail for District of Columbia prisoners. This train of references was first induced by a question by the prosecutor. And since the petitioner did not take the stand, a serious and substantial question is thereby raised as to whether the court took proper steps to counteract the prejudicial statements. As stated by this Court in *Farley* v. *United States*, 354 U.S. 521, 522, involving a claim that the trial court had erred in permitting the United States Attorney to ask irrelevant and prejudicial questions about another criminal offense, "If the allegations made by petitioner and his counsel are correct then it seems quite clear to us that his appeal cannot be characterized as frivolous."

More precisely, this issue may be broken down into four parts:

(1) What effect should be given the fact that the prosecution was responsible for the first reference to petitioner's past criminal record? This question becomes of critical importance by virtue of the fact that the prior report of the United States Commissioner, R. 13-14, was available to the prosecutor when he asked the complaining witness where he had seen petitioner, R. 2. That report made plain that the complaining witness, if asked where he had seen petitioner, would likely reply that he had served a year in jail with the petitioner. Yet, with that report available to him, the prosecutor asked a question that could be expected to and did bring out petitioner's prior jail sentence. In those circumstances, can the prosecutor be heard to say, R. 2, that "I didn't realize that this was the case"?

Precisely this kind of situation, where the prosecutor knew or should have known of the likely answer referring to the past criminal record, was involved in *United States* v. *Tomaiolo*, 249 F. 2d 683, 695 (C.A. 2), and led to the reversal of the conviction in that case. There the prosecutor, with knowledge gleaned from prior FBI advice, elicited testimony that the co-defendant had known the defendant's brother when both the defendant and his brother had been in prison. Said the court, pp. 695-696:

> "And it is fairly apparent that the prosecutor knew that the answers to his questions would reveal Soviero's criminal past. Certainly the special agents of the FBI had already advised him, out of court, of the reason why Soviero refused to sign the statement.
>
> "Nor may Tomaiolo's testimony be classed as purely voluntary. Even if he did not have actual knowledge

of the times during which Louis Soviero was in prison, the prosecutor had the means of gaining such information. Yet he pressed the reluctant Tomaiolo to answer."

In reply (Brief in opposition, p. 6), the Solicitor General has argued that the reference to petitioner's past prison record was proper since his identity was in issue and that the petitioner "gains no momentum" from the fact that the United States Commissioner's report was available to the prosecutor. The force of that argument needs to be explored on fuller consideration of this appeal; at this juncture the argument only adds to the non-frivolousness of the issue. And it may well be, as in *United States* v. *Apuzzo*, 245 F. 2d 416, 421 (C.A. 2), that this contention of the Government as to the admissibility of such evidence need never be reached "since the prosecutor did not offer it, and the incident did not develop so far as to raise the issue."

(2) What effect should be given the fact that the reference to petitioner's past record was not an isolated one but was repeated on several occasions? Here it seems impossible to argue that the first reference was so isolated as to be inconsequential. Cf. *United States* v. *Stromberg*, 268 F. 2d 256, 269 (C.A. 2). The matter was brought out not only by the prosecutor (R. 2) but by the trial judge himself (R. 3), by the complaining witness voluntarily (R. 5) and finally by the charge to the jury (R. 6). Thus the original reference, induced by the prosecution, was reiterated and magnified.

In these circumstances, was it enough for the court merely to strike the first two references? And what effect should be given the fact that one of the references (R. 3) was contained in a question by petitioner's court appointed

counsel?"[11] Is it enough to say, as the Solicitor General has said (Brief in opposition, p. 6), that petitioner "cannot predicate error on the deliberate tactics of trial counsel". All of these questions must be examined and answered in determining whether the chain of events was such as to prejudice the jury and deprive petitioner of a fair trial. *United States* v. *Tomaiolo*, 249 F. 2d 683, 695 (C.A. 2).

(3) Were the erroneous references cured by adequate admonitions and instructions to the jury by the trial judge? This is a most serious question. The judge here did no more than cryptically strike the first two references (R. 2, 3) without attempting then and there to erase any possible prejudicial effect from the jury's mind. Such summary action has been held totally inadequate. See *United States* v. *Tomaiolo*, *supra*, 695, where the court stated:

> "The prosecutor thereupon said 'I ask the jury to disregard the last statement' whereupon the trial judge repeated the thought: 'Yes. Disregard the last statement.' We think this was inadequate and the absence of sufficient instruction constitutes error."

On one other occasion (R. 5) the court did nothing whatever when the witness volunteered that "Me and Benny done a year in Occoquon." Indeed, the judge himself repeated

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[11] In *United States* v. *Tramaglino*, 197 F. 2d 928, 932 (C.A. 2), the defense attorney had elicited from a co-conspirator evidence that the defendant had sold some marihuana on a date outside the period named in the indictment. Said the court: "Inadmissible evidence like this might well be prejudicial and pivotal in a close case. Here there was little question but that it was inadvertent; it was elicited by a defense counsel and not by the government . . . Nonetheless it was error, even if inadvertent, and we must therefore rest our conclusion that it was not prejudicial on the ground that the other evidences of . . . guilt were so strong that it is unbelievable that a rational jury would have acquitted if this error had not occurred." Cf. *United States* v. *Giallo*, 206 F. 2d 207, 209-210 (C.A. 2).

the prejudicial fact during the trial (R. 3: "Why do you mention Occoquon?") and in his instructions to the jury (R. 6: ". . . the complaining witness, Mr. Edgeworth, testified that he and the defendant met at Occoquon."). Under these circumstances it is highly doubtful if it was sufficient for the judge to charge the jury, R. 6, that "you are to draw no inferences whatsoever as to the guilt of the defendant" from this prejudicial testimony and that such testimony "is to be considered only in as far as it affects his [the complaining witness'] credibility as a witness."

In other cases, courts have insisted on far more explicit and far-reaching instructions in order to make certain that the unfairness was fully dissipated. Thus in *United States* v. *Curzio*, 179 F. 2d 380, 381 (C.A. 3), after telling the jury at the time of the incident to brush the prejudicial statement from its mind, the judge in his charge to the jury stated: "I told you at that time to disregard that testimony completely, and I hope you did. We are trying the case on the evidence here in this courtroom and not on anything else, and there is no evidence in this case that Mr. Curzio has a police record or that he has ever been convicted of any crime before, so wipe that out of your minds completely." Such a complete instruction convinced the appellate court that the trial judge had done all that was possible to eradicate the prejudicial effects. And see *United States* v. *Stromberg*, 268 F. 2d 256, 269 (C.A. 2); *United States* v. *Apuzzo*, 245 F. 2d 416, 420, note 4 (C.A. 2); *Marsh* v. *United States*, 82 F. 2d 703, 704 (C.A. 3).

(4) Was the error so plain and substantial as to be reversible in the absence of objection by petitioner's court-appointed trial counsel? In *United States* v. *Modern Reed & Rattan Co.*, 159 F. 2d 656, 658 (C.A. 2), the court said such an error was so plain and so far-reaching that it should

be noticed even in the absence of an objection. And in *United States* v. *James*, 208 F. 2d 124, 125 (C.A. 2), this type of testimony was held to be too prejudicial "to permit the erroneous admission of it to pass as harmless error."

Such, then, are the substantial areas of inquiry to be made into the issue as to the prejudicial impact of the Occoquan testimony. From the standpoint of this issue alone, petitioner's appeal can no more be characterized as frivolous than was the appeal in *Farley* v. *United States*, 354 U.S. 521. Petitioner was thus entitled to a full hearing and resolution of this issue by the Court of Appeals.

b. *The constitutionality of Judge Jackson's assignment.*

The second non-frivolous issue presented by the record in this case is a serious and unresolved constitutional one. It grows out of three facts: (1) Judge Joseph R. Jackson, the presiding trial judge in this case, was nominated and confirmed in 1937 as a judge of the Court of Customs and Patent Appeals, entering upon his duties on December 15, 1937; (2) Judge Jackson retired from the Court of Customs and Patent Appeals as of April 1, 1952, see 193 F. 2d XV, thus covering a 14½ year period of service during all of which that court unquestionably was a legislative tribunal; (3) the said Judge Jackson was designated and assigned by the Chief Justice of the United States, pursuant to 28 U.S.C. §294(d), to serve as a district judge of the United States District Court for the District of Columbia throughout the year 1960, thereby covering the period of petitioner's trial in this case. The constitutional question thus posed is whether Article III of the Constitution permits such an assignment of a retired legislative court judge to perform the functions and powers of the District Court stemming from Article III.

Petitioner's counsel has presented this issue in the context of an effort to secure for petitioner the right to proceed with his appeal in the court below *in forma pauperis*. Under the *Ellis* case the presentation of any non-frivolous issue would entitle petitioner to exercise that right. Should this Court agree that this constitutional issue is indeed non-frivolous, the Court might deem it appropriate to remand the case so that the Court of Appeals could hear and determine the merits of this issue, together with that relating to the trial references to petitioner's past criminal record. In that way, the Court would obtain the benefit of the views of the Court of Appeals on the constitutional problem raised in this case.

However, the rather unique nature of this constitutional issue may make it desirable for this Court to resolve the issue now without awaiting further proceedings in the court below. Of necessity, the issue is not only constitutional but jurisdictional and is of the type that traditionally can be raised and resolved at any stage of a proceeding. More importantly, the issue is both novel and significant, and it may well affect the assignability of all legislative court judges to constitutional courts. And since the assignment of such judges is peculiarly the function of the Chief Justice of the United States, this Court may feel that it should resolve this important question immediately. Particularly may this course of action be appropriate in light of the fact that the court below has entered orders in at least four pending appeals from Judge Jackson's judgments, holding those appeals in abeyance pending this Court's possible resolution of the constitutional issue.[12]

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[12] Orders to that effect have been entered by the Court of Appeals in the following pending cases: *Valentine* v. *United States*, Misc. No. 1518; *Peters* v. *United States*, No. 15,546; *Mills* v. *United States*, No. 15,998; *Guterma* v. *United States*, No. 16,106.

Therefore, without abandoning the basic position that the raising of so non-frivolous an issue entitled petitioner under the *Ellis* case to process his appeal below and to secure a determination on this issue by the Court of Appeals, petitioner's counsel submits the following considerations in support of the proposition that the Constitution precluded the assignment of Judge Jackson to preside over this trial:

(1) *Petitioner's right to be tried by a constitutional court judge.* It has not been denied by the United States that petitioner, as an inhabitant of the District of Columbia under criminal indictment, was constitutionally entitled to be tried before a judge qualified to sit on a constitutional court. Indeed, that proposition is so elementary and so compelled by prior decisions of this Court as to be unquestionable.

As stated in *O'Donoghue* v. *United States,* 289 U.S. 516, 540, the inhabitants of the District of Columbia are "entitled to all the rights, guaranties, and immunities of the Constitution, among which . . . [is] the right to have their cases arising under the Constitution heard and determined by federal courts created under, and vested with the judicial power conferred by, Art. 3." This means that, in the exercise of their "privilege of trial by jury in criminal cases," *Callan* v. *Wilson,* 127 U.S. 540, 550, the people of the District are entitled to pursue such a constitutional privilege before a constitutional or Article III court composed of a judge fully qualified to sit thereon.

The trial of a criminal felony case—whether the crime be one outlawed by the United States Code or the District of Columbia Code—invokes the judicial power of the United States as defined in Article III. And it is the prime function of Article III courts "to try cases and controversies between individuals and between individuals and the Gover-

ment," including the "trial of criminal cases." *Toth* v. *Quarles*, 350 U.S. 11, 15. In such matters, therefore, the courts of the District of Columbia must be considered Article III courts and the judges of those courts clothed with the salary and tenure provisions of Article III.[13] *O'Donoghue* v. *United States*, 289 U.S. 516, 551. And accordingly the residents of the District are entitled to insist that the judges purporting to exercise criminal jurisdiction over them be in fact judges of an Article III nature. In the words of the Court in *Evans* v. *Gore*, 253 U.S. 245, 248, 253:

> "With what purpose does the Constitution provide that the compensation of the judges 'shall not be diminished during their continuance in office'? Is it primarily to benefit the judges, or rather to promote the public weal by giving them that independence which makes for an impartial and courageous discharge of the judicial function? . . .
>
> "These considerations make it very plain, as we think, that the primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause with respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich.

[13] Article III, Section 1, of the Constitution reads: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

> Such being its purpose, it is to be construed, not as a private grant, but as a limitation imposed in the public interest; in other words, not restrictively, but in accord with its spirit and the principle on which it proceeds."

Accordingly, petitioner has the right and the standing to demand that this public interest be vindicated and that his trial be conducted before a judge properly invested with the powers and protections of Article III. Only in that way can he be assured of a trial before a judge who possesses "that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich." *Ibid.*, 253.

Petitioner, in short, is entitled to question the propriety of the composition of the court before whom his liberty was at stake. See *United States* v. *American Foreign SS. Corp.*, 363 U.S. 685; *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132. More specifically, he can challenge the validity of the assignment of the judge charged with the duty of presiding at the trial, particularly since this challenge is made on a direct appeal from the conviction rather than in a collateral proceeding. See *Donegan* v. *Dyson*, 269 U.S. 49, 54-55.

(2) *The necessity of reaching the constitutional issue.* Petitioner's challenge to the assignment of Judge Jackson must be [redacted] constitutional terms. There can be no doubt as to the *statutory* authority for the assignment. The Court of Customs and Patent Appeals is generally known as "a United States court" and its judges are denominated as "judges of the United States" for purposes of the judicial retirement law, 28 U.S.C. §371(b). Such a designation, how-

ever, is quite consistent with the court being a legislative court and the judges thereof being legislative court judges. See *Ex parte Bakelite Corp.*, 279 U.S. 438, 460.

So too, the assignment statute plainly contemplates the assignment of a retired judge of the Court of Customs and Patent Appeals to the District Court.[14] Under 28 U.S.C. §294(d), as amended in 1958, the Chief Justice is authorized to designate and assign any "retired judge of the United States" on the specified roster to any court of appeals or district court in the country. As explained in S. Rep. No. 2309, 85th Cong., 2d Sess. (1958), 2 U.S. Code Cong. and Adm. News (1958), p. 3912, the 1958 amendment of §294 was designed *inter alia* to authorize the Chief Justice to assign "any retired judge of the . . . Court of Customs and Patent Appeals . . . to perform such judicial duties in any judicial circuit as he is willing to undertake."

Thus the only question unresolved is whether Congress has the constitutional power to grant such authorization. That issue is inescapably presented by the assignment in this case, an assignment that in all respects complied with the statutory requirements. An examination of the constitutional considerations is therefore in order.

(3) *The constitutional nature of the District Court for the District of Columbia.* The decision in *O'Donoghue* v. *United States*, 289 U.S. 516, makes plain that the United States District Court for the District of Columbia is a constitutional court of the United States, ordained and established under Article III of the Constitution, that the

[14] The assignment statute, 28 U.S.C. §294(d), conceivably could be interpreted so as to authorize the assignment only of judges of the Court of Customs and Patent Appeals who sat thereon or who retired after the statutory amendments of 1958. Thus the constitutional issue in this instance could be avoided. But a fair reading of the statutory language and particularly of its legislative history makes such a limited scope unlikely of delineation.

judges of that court hold their offices during good behavior, and that their compensation cannot, under the Constitution, be diminished during their continuance in office.

In addition, certain administrative or non-judicial functions may constitutionally be given to the District Court since, in dealing with the District of Columbia, "Congress possesses the powers which belong to it in respect of territory within a state, and also the powers of a state." *Ibid.*, 545. See also *Keller* v. *Potomac Electric Co.*, 261 U.S. 428, 442-443; *Butterworth* v. *Hoe*, 112 U.S. 50, 60; *United States* v. *Duell*, 172 U.S. 576; *Baldwin Co.* v. *Howard Co.*, 256 U.S. 35. Such powers stem from the express authority given Congress by the Constitution, Article I, Section 8, Clause 17, to legislate for the District of Columbia. The result of recognizing that the courts of the District may validly exercise both judicial and non-judicial functions has been to classify them as hybrid courts. See 1 Moore, Federal Practice, §0.4[4], p. 72 (2d ed., 1960).

But this hybrid nature does not negate the fact that the District Court for the District of Columbia is basically and primarily a constitutional court, the judges of which are nominated, confirmed and vested with authority for the primary purpose of exercising the judicial power of the United States under Article III of the Constitution. And in the administration of criminal justice, whether under the United States Code or the District of Columbia Code, that court is most certainly exercising a judicial rather than a non-judicial function, see *Toth* v. *Quarles*, 350 U.S. 11, 15. It is a function that can in no way be vested in or exercised by a legislative or administrative officer. Only a judge clothed with Article III power can so act. A judge of the District Court, as the *O'Donoghue* case teaches, does have that power. That is the power, of course, which was

invoked by the criminal proceeding against the petitioner in this case.

(4). *The legislative nature of the Court of Customs and Patent Appeals.* Judge Jackson was nominated and confirmed as a judge of the Court of Customs and Patent Appeals in 1937 and entered upon his duties on that court on December 15, 1937. He retired therefrom as of April 1, 1952.[15] During that period of time there can be no question but that the said court was "a legislative and not a constitutional court." *Ex parte Bakelite Corp.*, 279 U.S. 438, 459. It was a court created by Congress in 1909,[16] as the *Bakelite* opinion, pp. 458-9, pointed out,

> "... in virtue of its power to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution. The full province of the court under the act creating it is that of determining matters arising between the government and others in the executive administration and application of the customs laws. These matters are brought before it by appeals from decisions of the customs court, formerly called the board of general appraisers. The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed

[15] See 193 F. 2d XV. Judge Jackson is listed in 92 F. 2d XI as having been "appointed" to the Court of Customs and Patent Appeals on December 14, 1937. According to the records of that court, he took the oath of office and entered upon his duties on December 15, 1937.

[16] Tariff Act of 1909, 36 Stat. 105. That statute provided that "a United States Court of Customs Appeals is hereby created, and said court shall consist of a presiding judge and four associate judges appointed by the President, by and with the advice of the Senate, each of whom shall receive a salary of ten thousand dollars per annum. It shall be a court of record, with such jurisdiction as hereinafter established and created."

exclusively to executive officers. True, the provisions of the customs laws requiring duties to be paid and turned into the treasury promptly, without awaiting disposal of protests against rulings of appraisers and collectors, operate in many instances to convert the protests into applications to refund part or all of the money paid; but this does not make the matters involved in the protests any the less susceptible of determination by executive officers. In fact their determination has been at times confided to the Secretary of the Treasury, with no recourse to judicial proceedings.

"This summary of the court's province as a special tribunal, of the matters subjected to its revisory authority, and of its relation to the executive administration of the customs laws, shows very plainly that it is a legislative and not a constitutional court."

The essence of the *Bakelite* decision and its categorization of the Court of Customs and Patent Appeals as a legislative court is the emphasis put upon the fact that the court's functions could be, and at earlier times had been, performed by executive officers of the Government. The judicial hue permeating some of the court's proceedings cannot hide the essentially administrative or legislative nature of those proceedings. The court is simply carrying out some of the functions of government authorized by Article I of the Constitution, functions which at one point were performed solely within the Treasury Department. Thus the Court was compelled in the *Bakelite* case to conclude that this legislative court was not created to execute, and does not in fact execute, the judicial power of the United States specified in Article III. And in *Williams* v. *United States*, 289 U.S. 553, 571, a unanimous Court took pains to state that "Further reflection tends only to confirm the views expressed in the Bakelite Corp. opinion as

to the status of the Court of Customs Appeals, and we feel bound to reaffirm and apply them." [17]

The dichotomy between legislative and constitutional courts which flowered in the *Bakelite* and *Williams* cases with specific reference to the Court of Customs and Patent Appeals had its genesis in the opinion of Chief Justice Marshall in *American Ins. Co.* v. *Canter*, 1 Pet. 511, 546, rendered in 1828. There the status and jurisdiction of courts created by Congress for the then Territory of Florida were drawn into question. And there the Chief Justice concluded that such courts, being composed of judges holding office for only four years,

> ". . . are not constitutional Courts, in which the judicial power conferred by the constitution on the general government, can be deposited. *They are incapable of receiving it.* They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States." [Emphasis added.]

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[17] In the *Williams* case, the then Solicitor General took the position that the Court of Claims, like the Court of Customs and Patent Appeals, was not an Article III court—a position which the Court sustained. But in 1944 in *Pope* v. *United States*, 323 U.S. 1, after a restudy of the question, Solicitor General Fahy's brief argued that the *Williams* case was wrong. The Court in the *Pope* case, 323 U.S. at 13, however, found it unnecessary "to consider what effect the imposition of non-judicial duties on the Court of Claims may have affecting its constitutional status as a court and the permanency of tenure of its judges."

Thus it can be said that the Court of Customs and Patents Appeals, being solely legislative in its origins and functions, is "incapable of receiving" the judicial power designated in Article III of the Constitution. And since a judge can receive no more and no less authority than the court to which he is appointed, a judge of the Court of Customs and Patent Appeals must be deemed "incapable of receiving" Article III judicial power. In effect, he is authorized to perform only the functions which the Court in the *Bakelite* case found were earlier performable by executive department officials. At no time was he ever nominated, confirmed or authorized to perform any Article III functions —functions that he is "incapable of receiving."

Leaving aside for the moment the effect of the 1958 legislation labeling the Court of Customs and Patent Appeals a constitutional court, Congress has consistently treated this court as a legislative court. Not until 1930, following the *Bakelite* decision, did Congress seek to provide the judges of this court with tenure "during good behavior." Act of June 17, 1930, 46 Stat. 762, 28 U.S.C. §301a (1940 ed.). It then sought to make such tenure retroactive, indicating that prior to the 1930 statute the judges held office only at the will of the President or Congress. To be sure, a legislative court judge may hold office "for such term as Congress prescribes, whether it be a fixed term of years or during good behavior" without affecting his legislative status. *Ex parte Bakelite Corp.*, 279 U.S. 438, 449. But the freedom with which Congress has dealt with the tenure of these judges—in contrast to the constitutional requirement of good behavior tenure for Article III court judges —emphasizes the legislative control which is the hallmark of legislative judges.

Moreover, when Congress enacted the Legislative Appropriation Act of June 30, 1932, 47 Stat. 382, 402, reducing

the salaries of all judges other than Article III judges to $10,000 per annum, the judges of the Court of Customs and Patent Appeals were quick to comply.[18] And this Court in *Williams* v. *United States*, 289 U.S. 553, held that Congress could make such a reduction as to judges of the Court of Claims because they, like judges of the Court of Customs and Patent Appeals, were merely legislative court judges. In contrast, the companion decision in *O'Donoghue* v. *United States*, 289 U.S. 516, held that such a legislative reduction in salary could not be made as to judges of the District of Columbia courts because of their constitutional status. Hence this 1932 action of Congress in cutting the salaries of judges of the Court of Customs and Patent Appeals is a dramatic illustration of the legislative control over those judges retained by Congress. Had such judges had any semblance of Article III power, the Constitution would have forbidden this salary reduction.

Finally, it should be noted that the fact that this Court has acknowledged jurisdiction to review customs cases—in contrast to patent and trademark matters—arising in the Court of Customs and Patent Appeals[19] in no way detracts from the legislative nature of that court. The *Bakelite* decision, 279 U.S. at 451, recognized that legislative tribunals may determine certain matters susceptible of judicial resolution. And in *Pope* v. *United States*, 323 U.S. 1, the Court expressly held that the judicial determinations of a legislative court may be subjected to appellate review by this Court even though the non-judicial functions of such

[18] Counsel is advised that the judges of the Court of Customs and Patent Appeals voluntarily accepted the reduction in salary from $12,500 to $10,000 and waived any constitutional claims they might otherwise have made—futile though such claims might have been by virtue of the *Williams* decision.

[19] See *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294; *Barr* v. *United States*, 324 U.S. 83.

a court are not so subject. But the judicial determinations thus reviewable on appeal do not reflect the possession of any Article III power by the legislative court. In the words of Chief Justice Vinson in his opinion in *National Ins. Co.* v. *Tidewater Co.*, 337 U.S. 582, 641:

> "The legislative courts created by Congress also can and do decide questions arising under the Constitution and laws of the United States (and, in the case of territorial courts, other types of jurisdiction enumerated in Article III, §2 as well), but that jurisdiction is not, and cannot be, 'a part of that judicial power which is defined in the 3d article of the Constitution.' These courts are 'incapable of receiving it.' *American Insurance Co.* v. *Canter*, 1 Pet. 511 at 546; *Reynolds* v. *United States*, 98 U.S. 145 at 154."

(5) *The impact of the 1958 designation of the Court of Customs and Patent Appeals as a constitutional court.* At least until August 25, 1958, there is not the slightest indication that the Court of Customs and Patent Appeals was anything other than a legislative court. Neither the court nor its judges were thought to possess Article III judicial power, and it is clearly evident that Judge Jackson was nominated, confirmed and served as a judge of a purely legislative court during his term ending in 1952. And nothing set forth in the Solicitor General's brief in this case in opposition to the petition for certiorari appears to the contrary.

What the Solicitor General did say in that brief is that the Act of Congress, effective August 25, 1958, 72 Stat. 848, constituted a declaration of Congressional intent "that the Court of Customs and Patent Appeals should be a constitutional court," thereby affecting "the status of all the judges of that court, both active and retired." (Brief, p. 7.) Just

as the legislation *ipso facto* made the judges on that court in 1958 judges of an Article III court, said the Solicitor General (Brief, p. 8), "so it made Judge Jackson a retired judge of an Article III court" and hence "in no way disabled from presiding in the district court."

Inquiry into the meaning and effect of this 1958 legislative declaration thus becomes necessary.[20] This declaration took the form of an amendment to 28 U.S.C. §211, adding a second sentence, so that it now reads:

> "The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record known as the United States Court of Customs and Patent Appeals. Such court is hereby declared to be a court established under article III of the Constitution of the United States."

As stated in the authoritative legislative report, S. Rep. No. 2309, 85th Cong., 2d Sess. (1958), 2 U.S. Code Cong. and Adm. News (1958), pp. 3909-3910, the primary purpose of this amendment was

> ". . . to settle the status of the Court of Customs and Patent Appeals by declaring it to be a constitu-

[20] The brief in opposition to the petition for certiorari in this case (p. 7) misconstrued petitioner's position with respect to the 1958 legislation. Petitioner never conceded that this legislation was constitutionally effective in establishing the Court of Customs and Patent Appeals as a constitutional court. Nor did he concede that the judges sitting on that court at the time of the 1958 amendment became judges of an Article III court. In emphasizing that the problem in this case is whether the assignment statute can validly be applied to an assignment of a retired judge of a court that during his tenure thereon was never more than a legislative court (Petition, p. 15), petitioner was merely underscoring the issue in terms of the facts of this case. To determine the issue as thus confined, it may well be necessary to determine the full impact of the 1958 legislation on the court itself, the judges sitting in 1958 and retired judges such as Judge Jackson.

tional court. The court is now constituted under section 211 of title 28, United States Code, and is classified as a legislative court. Section 1 of the bill would amend section 211 so as specifically to declare the court 'to be a court established under article III of the Constitution of the United States.'

"The cases over which the Court of Customs and Patent Appeals has jurisdiction come within the judicial power of the United States as set forth in article III, which provides that such judicial power shall extend to controversies to which the United States shall be a party. Prior to the creation of the court by the Tariff Act of 1909 the jurisdiction which it now exercises to review decisions of the Customs Court (until 1926 called the Board of General Appraisers) was exercised by the former circuit courts of the United States under section 15 of the Customs Administrative Act of June 10, 1890 (ch. 407, 26 Stat. 138). The old circuit courts were, of course, constitutional courts. And prior to April 1, 1929, the jurisdiction which the court now exercises to review decisions of the Patent Office was exercised by the Court of Appeals for the District of Columbia, a constitutional court. See the act of March 2, 1929 (ch. 488, 45 Stat. 1476). Thus there can be no doubt that the Court of Customs and Patent Appeals should be a constitutional court.

"Similar legislation was enacted by the 83rd Congress establishing the Court of Claims as a constitutional court (act of July 28, 1953, ch. 253, 67 Stat. 226) and by the 84th Congress establishing the Customs Court as a constitutional court (act of July 14, 1956, ch. 589, 70 Stat. 532). There has never been any revisory power in the executive or legislative branches of the Government over the decisions of the Court of Customs and Patent Appeals. On the contrary its deci-

sions are final, subject only to review by the Supreme Court of the United States. The bill will remove all doubt as to the status and source of authority of the court by making it explicitly clear that it is established under and derives its judicial power from article III of the Constitution.

The bill to designate the Court of Customs and Patent Appeals as a constitutional court and to make various other amendments involving the assignment of judges was known as H.R. 7866, 85th Cong. When this bill reached the floor of the House of Representatives for discussion,[21] Representative Celler and Representative Keating both made it plain that the bill "makes no change in the structure, organization or jurisdiction of the court." 104 Cong. Rec. 16095 (Aug. 4, 1958). Representative Keating added, however, that:

> "The Court of Customs and Patent Appeals hears appeals in patent, customs and tariff cases raising questions under the Constitution, the laws of the United States, and treaties made under their authority. Its jurisdiction also extends to controversies to which the United States is a party. This subject matter has always been of the type to which jurisdiction extends by virtue of the Constitution. Under these circumstances, the court itself should be established as a constitutional court under article III."

In sum, the 1958 legislation was the last in a series of three Congressional steps taken to overrule this Court's decisions in the *Bakelite* and *Williams* cases. In 1953 the Court of Claims was declared to be a constitutional court,

[21] The Senate discussion of the bill was unilluminating with respect to the problem here under inquiry. 104 Cong. Rec. 17548-17549 (Aug. 14, 1958).

67 Stat. 226, 28 U.S.C. §171, contrary to the conclusion reached in the *Williams* case, 289 U.S. at 581, that the Court of Claims "receives no authority and its judges no rights from the judicial article of the Constitution." In 1956 the Court of Customs was declared to be a constitutional court, 70 Stat. 532, 28 U.S.C. §251, contrary to this Court's description of its functions in the *Bakelite* case, 279 U.S. at 457-8, as "all susceptible of performance by executive officers." And the 1958 legislation with reference to the Court of Customs and Patent Appeals was in direct collision with the *Bakelite* determination, 279 U.S. at 458-9, that this court's background and functions "shows very plainly that it is a legislative and not a constitutional court." Essentially the same reasons were advanced by Congress in each of these three instances for declaring the respective courts to be spawned under Article III. In each instance the primary reason was that the given court in fact exercises jurisdiction over matters arising under the Constitution and laws of the United States, and within the judicial power of the United States, and hence should be classified as constitutional.[22]

Of direct pertinence to the instant case is the fact that Congress, in the process of declaring the Court of Claims a constitutional court in 1953, also sought to remove any doubt as to the power of Congress to authorize the Chief Justice of the United States to assign district and circuit judges to sit on the Court of Claims. By labeling the tribunal a constitutional court and then expressly providing for such assignments, said the authoritative House

[22] See H. Rep. No. 695, 83rd Cong., 1st Sess. (1953), 2 U.S. Code Cong. and Adm. News (1953), p. 2006, as to the Court of Claims; H. Rep. No. 2348, 84th Cong., 2d Sess. (1956), 2 U.S. Code Cong. and Adm. News (1956), p. 3122, as to the Court of Customs.

Report,[23] Congress would thereby remove all of the "considerable doubt expressed as to the authority of Congress to provide for the assignment of a judge of a constitutional court to sit on the Court of Claims in view of the ruling that it was a legislative and not a constitutional court."[24] Such considerable doubt presumably sprang from the observation of this Court in the *Bakelite* case, 279 U.S. at 460, that there might "be constitutional obstacles to assigning judges of constitutional courts to legislative courts."

And by providing subsequently for the interassignment of judges between the district and circuit courts on the one hand and the Court of Customs and the Court of Customs and Patent Appeals on the other, see 28 U.S.C. §§291, 292, 293, following the designation of the latter two courts as constitutional tribunals, Congress seemingly sought to erase any doubts as to the constitutionality of such assignments.[25]

Thus the ultimate constitutional issue as to the assignment of Judge Jackson to the District Court below, as well as the thrust of the 1958 legislation on that issue, becomes clear. This Court, as a matter of constitutional analysis, has established that there are very real distinctions between legislative and constitutional courts. As

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[23] H. Rep. No. 695, 83rd Cong., 1st Sess. (1953), 2 U.S. Code Cong. and Adm. News (1953), p. 2009.

[24] "Doubt as to the constitutionality of assigning judges from constitutional to legislative courts and vice versa was a reason Congress assigned for classifying the Court of Claims and Customs Court as constitutional courts." 1 Moore, Federal Practice, §0.4[1], p. 60, note 34 (2d ed., 1960).

[25] In *Irish* v. *United States*, 225 F. 2d 3 (C.A. 9), a judge from the then territorial district court of Hawaii, a legislative court, was assigned to sit on the Court of Appeals for the Ninth Circuit, a constitutional court. This assigned judge wrote the opinion for the Court of Appeals. Doubt has been expressed as to the wisdom of such an assignment. See Note, 69 Harv. L. Rev. 760 (1956).

Far back as 1828, when Chief Justice Marshall delivered the *American Insurance Co.* opinion, 1 Pet. 511, those distinctions have been recognized as creating a wall between such courts to the point where legislative courts and their judges are "incapable of receiving" any of the judicial power of the United States flowing from Article III of the Constitution. Hence it has been assumed, as the *Bakelite* opinion implied (279 U.S. at 460), that this incapacity constitutionally foreclosed the assignment of legislative court judges to sit on constitutional courts so as to exercise Article III judicial power. Certainly Congress so assumed, and acted on that assumption, in its triadic effort to authorize such assignments.

The 1958 declaration by Congress as to the constitutional status of the Court of Customs and Patent Appeals thus represents a critical step in any attempt to legitimatize the assignment at issue in this case. Is such a declaration constitutionally effective? And to the extent that it is effective, can it be applied retroactively so as to invest an already retired legislative court judge with Article III powers? Those are the ultimate questions to be answered in this case. And the substantiality and difficulty implicit in those questions are clearly reflected in the action of the Judicial Conference of the United States qualifying its approval of the 1958 legislation by expressing "no view on the question whether the declaration that the United States Court of Customs and Patent Appeals was a court established under Article III of the Constitution of the United States would be constitutionally effective." [26]

[26] See S. Rep. No. 2309, 85th Cong., 2d Sess. (1958), 2 U.S. Code Cong. and Adm. News (1958), p. 3916. The Committee on Revision of the Laws of the Judicial Conference further stated "that it regarded that as a judicial question for determination by the Federal courts if it arose and not within the competence of the Judicial Conference or its committees."

(6) *The constitutional incapacity of Congress to alter the status of a legislative court by a mere declaration of the court's constitutional status.* At the base of the constitutional distinction between legislative and constitutional courts is a very simple factor: under what article of the Constitution was Congress acting when it created the particular court and endowed it with specified jurisdiction? If Congress was acting in the execution of one of its various Article I powers, the court is legislative in nature. But if Congress was acting in order to execute the judicial power of the United States under Article III, the court is a constitutional tribunal.

That is precisely the demarcation made by this Court in *Ex parte Bakelite Corp.*, 279 U.S. 438, 459, when it pointed out that it is a mistake to assume that "whether a court is of one class or the other depends on the intention of Congress," since "the true test lies in the power under which the court was created and in the jurisdiction conferred." Moreover, and in words of highest relevance to this case, the Court further noted that any constitutional obstacles to assigning judges from one type of court to another cannot be avoided "on the theory that Congress intended the court to be in one class when under the Constitution it belongs in another." 279 U.S. at 460.

To put the matter simply, a court assumes a certain status at the time of its legislative birth. In the absence of any change in the nature, functions or jurisdiction of the court, that status can no more be changed merely by a subsequent legislative declaration than can the stripes of a tiger be erased by a joint resolution of Congress. Or, to use another humble example, a man born in France can never in fact be born in Germany by virtue of a legislative fiat. Only if there is some change in the nature or jurisdiction of the court, or some effective form of sub-

stantive reorganization of the court, can a court be transposed from a legislative to a constitutional status, or vice versa.

Here the original status of the Court of Customs and Patent Appeals has been authoritatively determined by this Court in the *Bakelite* and *Williams* cases. It was a court established solely under the Article I powers of Congress and its functions and jurisdiction were solely those of a legislative court. But in seeking to change that designation in 1958, Congress made it quite clear that it was making "no change in the structure, organization, or jurisdiction of the court." 104 Cong. Rec. 16095 (Aug. 4, 1958). Congress thus eschewed any intention of giving that court any new powers which might be fairly construed as Article III powers. Thus the 1958 change was merely a semantic one, a change of nomenclature. Needless to say, constitutional distinctions of this far-reaching importance must rest on something more substantial than a word change.

The shallowness of such a change was recognized by the Deputy Attorney General of the United States in 1955 in commenting on the proposal to label the Customs Court a constitutional court.[27] The position taken by that bill, he said, "seems to be that the distinction between a legislative and a constitutional court is a matter of language." He then proceeded to call the attention of the Chairman of the House Committee on the Judiciary to this Court's opinion in the *Bakelite* case where the Customs Court had been found to perform only executive functions; and he quoted without comment the portion of that opinion explaining that the

[27] Letter from William P. Rogers, Deputy Attorney General, to Representative Celler, Chairman of the House Committee on the Judiciary, dated July 29, 1955, attached to H. Rep. No. 2348, 84th Cong., 2d Sess. (1956), 2 U.S. Code Cong. and Adm. News (1956), p. 3124.

status of a court depends not on the intention of Congress but on the power under which the court was created.

The statement of Congress in 1958 that the Customs and Patent Appeals Court was thenceforth to be known as a constitutional court thus comes to no more than an expression of Congressional opinion completely divorced from any change in the nature or functions of that court. It is precisely the kind of expression which the *Bakelite* case held to be wholly irrelevant. And the rationale given for making such a declaration, to the effect that the cases coming before that court do indeed fall within the judicial power of the United States as set forth in Article III, is nothing more than an attempt to second-guess this Court's definitive resolution of that matter in the *Bakelite* and *Williams* cases.[28] Prolonged discussion is unnecessary to demonstrate that this Court, not Congress, is the final authority in determining the applicability of the various articles of the Constitution to courts created by Congress. Cf. *Pennekamp* v. *Florida*, 328 U.S. 331, 335.

The conclusion is inescapable that the 1958 declaration of Congress, absent any change in the structure, organization or jurisdiction of the court, was totally ineffective to transform the Court of Customs and Patent Appeals into a constitutional or Article III tribunal. And the judges of

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[28] In reporting the bill to fasten the constitutional court label on the Court of Claims, the House Committee on the Judiciary stated *inter alia*: "It seems certain that Congress, when it established the Court of Claims in 1854, intended to create a court under article III. (See Congressional Globe, 33d Cong., 2d sess., pp. 71, 72, 105-106, 110, 111, 113, and 114.) . . ." H. Rep. No. 695, 83rd Cong., 1st Sess. (1953), 2 U.S. Code Cong. and Adm. News (1953), p. 2007. Such a statement, made 99 years after the establishment of the court, cannot serve to change the legislative purpose or power in establishing the court, as determined in the *Williams* case. See *United States* v. *United Mine Workers*, 330 U.S. 258, 282.

that court—both the retired and the active judges—were no more capable of receiving or exercising Article III judicial power after that declaration than before it. Hence there is lacking any constitutional sanction for applying the assignment statute, 28 U.S.C. §294(d), so as to permit the assignment of a legislative court judge, especially a retired one, to an Article III court in order to exercise the judicial power of the United States in a criminal proceeding.

This conclusion is in no way altered by the fact that the *O'Donoghue* decision determined that the courts of the District of Columbia are of a hybrid nature, exercising both legislative and Article III powers. A legislative court judge, incapable of receiving or exercising Article III judicial power, is no more capable of exercising such power in a hybrid court to which he may be assigned than he is in a court organized exclusively under Article III. He is just as unable to execute the judicial power of the United States in a court of the District of Columbia as is a member of the National Labor Relations Board were Congress suddenly to denominate the Board an Article III court.

And the foregoing conclusion is even more obvious in the case of a legislative court judge who has retired, particularly one who was appointed to a legislative court and who retired therefrom years before Congress sought to change the court's label. While a retired constitutional court judge is considered as continuing in office within the meaning of Article III, Section 1, of the Constitution so as to forbid any diminution of his retirement compensation, *Booth* v. *United States*, 291 U.S. 339, there is no authority for adding Article III judicial functions to the powers of a judge who has previously retired from a strictly legislative court. The extent of his powers and functions must

be determined from the powers and the functions of the court to which he was originally appointed and as of the time of that appointment—at least where the powers and functions of the court remain unchanged during his tenure thereon.

Here Judge Jackson was never nominated by the President or confirmed by the Senate with the idea of his exercising Article III judicial powers; nor did he retire possessing any powers other than those of a legislative court judge. He was nominated and confirmed in 1937 on the theory that he was qualified to exercise only legislative court powers. In light of the *Bakelite* opinion then in full effect, no basis is apparent for assuming that the President or the Senate ever thought that he could or would execute any Article III judicial power by virtue of that appointment. To consider him as now possessed of new, Article III powers necessarily assumes that the Court of Customs and Patent Appeals has been reconstituted and its powers and duties altered. And if that assumption be true, renomination and reconfirmation of that court's judges would be necessary before any of them could exercise their new Article III powers. But, as already noted, no such structural change has occurred as to the Court of Customs and Patent Appeals. Hence a judge who retired from that court prior to 1958 took with him into retirement only those powers which he derived from the court during his tenure. To attempt to give him Article III powers retroactively, without even trying to alter the nature of the court upon which he sat, is a meaningless gesture.

As indicated, the effective transposition of a court from a legislative to an Article III status would require not only a change in its duties but the renomination and reconfirmation of all the judges then sitting, or the appointment

of new judges.[29] Just how a retired legislative court judge could be renominated and reconfirmed as a retired Article III court judge is not clear. But the need for some form of reappointment is obvious. The considerations which give rise to the nomination and confirmation of a man to perform the essentially executive functions of a legislative court are not necessarily the same as those involved where the appointee must be equipped to wield the Article III judicial powers. A man may be thought qualified to resolve difficult tariff or customs problems but not of the right background, training or temperament to deal with the problems of life, liberty and property in an Article III court. And if all active and retired legislative court judges are suddenly to be qualified to dispense Article III justice the President and the Senate should have some opportunity to re-evaluate such court personnel in that light. Otherwise the appointive powers of the President and the confirmation duties of the Senate are abdicated to the Chief Justice of the United States in the exercise of his assignment powers.

Finally, any conclusion that the Court of Customs and Patent Appeals is, by virtue of the 1958 amendment, a constitutional court and that its active and retired judges may be assigned to sit on Article III courts is to open a

[29] The need for reappointing judges of a legislative court if and when the fundamental character of such a court is changed was recognized in the following colloquy on the floor of the Senate during the consideration of the bill to declare the Court of Claims a constitutional court (no change being made in the structure or functions of that court), 99 Cong. Rec. 8944, July 10, 1953:

> Mr. Gore: I think it resolves itself into a question of whether we do or do not reconstitute the court. If we change the fundamental character of the court, then reappointment or appointment, as the case might be, would become absolutely necessary, and the appointments would require confirmation.
>
> Mr. McCarran: Again the Senator and I are in agreement on that, as a moot question, because we have agreed on the House bill.
>
> Mr. Gore: We shall get together on that later.

Pandora's box of confusion and inconsistencies. It still remains true, for example, that this Court will not and cannot review any lower court determination other than that of a judicial nature. And the Court of Claims—despite its denomination by Congress as an Article III court—still retains statutory jurisdiction to render advisory opinions on bills for monetary relief of claimants referred by either house of Congress. 28 U.S.C. §§1492, 2509. At the same time, however, the constitutional concepts of "cases" and "controversies", over which the federal judicial power extends, have been held to deny Article III courts the power to give advisory opinions. See, e.g., *Muskrat v. United States*, 219 U.S. 346.

How, then, can the new "constitutional" or Article III status of the Court of Claims be squared with its continuing power to render advisory opinions to Congress? Is not the 1953 declaration as to the Court of Claims inoperable on this basis alone? Or are the concepts of "cases" and "controversies" to be scrapped and recognition given to the fact that Article III courts can be delegated to perform non-judicial functions?[30]

The problem and perhaps the simple answer are to be found in the discussion of Senator Gore during the debate on the 1953 declaration as to the Court of Claims (99 Cong. Rec. 8943-8944, July 10, 1953):

> "I refer to the basic question of whether Congress can, under the Constitution, designate the Court of Claims an article III court and still require it to exercise the special type of jurisdiction which it has conferred upon it.
>
> "Over the years the Supreme Court has consistently followed the principle that the Federal courts, other

[30] See Note, The Constitutional Status of the Court of Claims, 68 Harv. L. Rev. 527, 531-535 (1955).

than those for the District of Columbia, created under article III of the Constitution, can exercise only jurisdiction falling within the judicial limits set forth in article III. . . . Thus a cloud is cast upon the constitutionality of having the Court of Claims, as an article III court, exercise the principal jurisdiction which Congress has conferred upon it. . . .

"Section 2509 of title 28 of the United States Code directs the Court of Claims to render advisory opinions on cases referred to the court by the Congress. This would seem to be a function which Congress could not require of a constitutional court. No one would seriously contend that it is a judicial power in the sense of article III.

"Since the present judges of the Court of Claims have indicated that they would raise no objection to continuing to act on congressional reference cases, perhaps the problem is moot, at least temporarily. If in the future judges of the Court of Claims should refuse to act upon congressional reference cases on the grounds that they are not within the proper scope of jurisdiction of a constitutional court, *I suppose the simple remedy will be for Congress to redesignate the Court of Claims as a legislative court.*" [Emphasis added.]

The "simple remedy" thus provided by Senator Gore is most revealing as a statement of the belief that Congress can turn the Article III status of such a court as the Court of Claims on and off like a faucet. And it epitomizes the constant threat that hangs over such a court, the threat that some day Congress may change its intention and relabel it a legislative court, with all the salary and tenure implications that such a relabeling would entail. Such is the ephemeral quality of the Congressional relabeling process.

Still another problem raised by any recognition of the effectiveness of a legislative declaration of an Article III status is one directly involving the Court of Customs and Patent Appeals. Ever since the decision in *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693, this Court has recognized that the decisions of that court in patent and trademark application matters are not reviewable judicial judgments but merely instructions "by a court which is made part of the machinery of the Patent Office for administrative purposes."[31] See also *Pacific Northwest Canning Co.* v. *Skookum Packers' Assn.*, 283 U.S. 858; *McBride* v. *Teeple*, 311 U.S. 649.

But if the Court of Customs and Patent Appeals actually did acquire Article III status in 1958, its jurisdiction to consider such patent and trademark matters and to render administrative judgments thereon would be in constitutional jeopardy. Yet that court continues to resolve such non-judicial matters. And the United States, consistent with its position in the pre-1958 legislative court days, continues to oppose the grant of certiorari to review such post-1958 decisions on the ground that they are still non-judicial decisions outside the appellate jurisdiction of this Court. See briefs in opposition to certiorari in *Rubenfield* v. *Watson*, 362 U.S. 903; *Commissariat à L'Energie Atomique* v. *Watson*, 362 U.S. 977. And this Court has denied certiorari in those post-1958 cases, though without specifying the reasons.

Perhaps the "simple remedy" here is the one previously given by Senator Gore as to the Court of Claims—if Con-

[31] While the *Postum* case involved such an administrative determination by the Court of Appeals for the District of Columbia, that court's jurisdiction over such matters was transferred in 1929 to the Court of Customs and Patent Appeals, 45 Stat. 1475, and the decision in *Postum* is fully applicable to the decisions of the latter court.

gress really wants the Court of Customs and Patent Appeals to continue dealing with patent and trademark cases it should relabel the court a legislative tribunal. Here, then, is the threat that must constantly hang over the judges of the Court of Customs and Patent Appeals, the threat of another relabeling statute and the possibility that Congress may once again act—as it did in 1932—to cut their salaries, or to change their tenure.

These problems, if they be such, are merely indicative of the inescapable fact that the courts which were found to be legislative in nature in the *Bakelite* and *Williams* cases continue to function and operate in the same non-Article III manner as was described in those opinions. Their legislative nature continues to the present day within their original jurisdictional bounds. Nothing has changed. Like the stripes on the tiger, the non-Article III characteristics remain evident despite the Congressional name-changing action.

Enough has been said to indicate the dangers of such a facile legislative labeling process in dealing with the serious constitutional distinctions between legislative and Article III courts. Those are distinctions which only this Court can ultimately determine and resolve. And its decisions should remain final by virtue of its supreme power to interpret and apply the Constitution.

No reason is apparent why this Court's decisions in *Bakelite* and *Williams* should not be respected as to the still unchanged status of the Court of Customs and Patent Appeals. Accordingly, the 1958 amendment to 28 U.S.C. §211 must be considered void and of no effect. And the attempt to authorize the Chief Justice of the United States to assign a retired judge of such a legislative court to perform judicial functions in an Article III court must likewise fall.

Conclusion

For the foregoing reasons the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed and petitioner allowed to proceed with his appeal *in forma pauperis*. On remand, the court below should hear and resolve the two non-frivolous issues raised on behalf of the petitioner, unless this Court in its discretion finds it appropriate to adjudicate either or both of these issues on their merits at this time.

Respectfully submitted,

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March 28, 1961

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In forma pauperis
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No. 669

In the Supreme Court of the United States

OCTOBER TERM, 1960

BENNY LURK, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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Morison and Commager, *The Growth of the American Republic* (vol. 2, 4th ed. 1956), pp. 77–78 62

Note, *The Judicial Power of Federal Tribunals Not Organized Under Article Three*, 34 Col. L. Rev. 746 (1934) 65

Note, *The Restrictive Effect of Article Three on the Organization of Federal Courts*, 34 Col. L. Rev. 344 (1934) 65

Rules of the United States Court of Appeals for the District of Columbia Circuit:

Rule 19 38

Rule 31(a) 38

Rules of the United States Supreme Court:

Rule 16(1)(c) 34

1 U.S. Court of Customs Appeals Rep 85, 86

2 U.S. Court of Customs Appeals Rep 86

Watson, *The Concept of the Legislative Court: A Constitutional Fiction*, 10 Geo. Wash. L. Rev. 799 (1942) 65

Wigmore, *Evidence* (3d ed. 1940), § 215 42

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 669

BENNY LURK, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The order of the court of appeals (R. 34) is not reported.

JURISDICTION

The order of the court of appeals was entered on September 23, 1960 (R. 34). A petition for a writ of certiorari was filed on October 21, 1960, and was granted on January 23, 1961 (R. 35). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals, after appointing counsel (who submitted legal memoranda) and granting an appeal in forma pauperis to the extent of providing petitioner a trial transcript, was justified in

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denying this petitioner further leave to appeal in forma pauperis.

2. Whether the court of appeals should have considered as reviewable error, on an application for leave to proceed in forma pauperis, an allegation made for the first time in that court that it was unconstitutional for a judge who retired from the Court of Customs and Patent Appeals prior to 1958 to preside at petitioner's criminal trial in the District Court for the District of Columbia.

3. Whether a judge who retired from the Court of Customs and Patent Appeals prior to 1958 could constitutionally preside at petitioner's criminal trial in the District Court for the District of Columbia.

STATUTES INVOLVED

The forma pauperis statute, 28 U.S.C. 1915; the statute providing for the Court of Customs and Patent Appeals, 28 U.S.C. 211; the statute authorizing the assignment of retired judges, 28 U.S.C. 294; and the portion of the Payne-Aldrich Tariff Act of August 5, 1909, under which the Court of Customs Appeals (now the Court of Customs and Patent Appeals) was created are to be found in Appendix A, *infra*, pp. 127–136.

STATEMENT

Petitioner was convicted of robbery in the United States District Court for the District of Columbia (R. 14, 18) and was sentenced to a prison term of not less than four years and nine months and not more than fourteen years and three months (R. 18). A motion filed in the district court for leave to

appeal in forma pauperis was denied "as plainly frivolous and not made in good faith" (R. 18). Petitioner then filed a petition in the Court of Appeals for the District of Columbia Circuit for leave to prosecute an appeal without prepayment of costs (R. 8–9). That court appointed counsel to represent petitioner and subsequently ordered that he be allowed to prosecute an appeal without prepayment of costs to the extent being supplied a transcript of the trial (R. 9, 12). Petitioner's counsel and the government submitted legal memoranda to the court of appeals (R. 13–33). On September 23, 1960, the court of appeals denied the petition (R. 34).

Petitioner attacks the denial of leave to proceed in forma pauperis and bases his claim upon the following circumstances:

1. ***Proceedings in the district court.***

Petitioner was charged with having robbed Charles C. Edgeworth of property valued at $58.31 on December 14, 1959 (R. 14). Edgeworth reported the robbery the night it occurred, but petitioner was not apprehended until January 26, 1960, when Edgeworth saw him on the street and pointed him out to police who arrested him (R. 15).

The government's case consisted of the testimony of a witness who was present at the time of the robbery but who was unable to identify petitioner; of the policemen to whom Edgeworth made his charges against petitioner; and of Edgeworth (R. 14–16).[1]

[1] A second man who participated in the robbery was never identified or apprehended.

Petitioner called no witnesses nor did he take the stand.

In his testimony, Edgeworth positively identified petitioner as one of the men who had robbed him (R. 2).[2] Counsel for the government then asked whether he had known petitioner prior to the date of the robbery, to which he replied that he had not known petitioner's name, but that he "knew his face" (R. 2). The following colloquy then took place (R. 2):

> Q. You had seen him before, correct?
> A. Yes, sir.
> Q. Where had you seen him?
> A. In Occoqu[a]n.[3]

Government counsel immediately moved to strike the answer (R. 2). It was stricken and direct examination was continued with no further reference to any prison association between the complaining witness and petitioner (R. 3).

On cross-examination, petitioner's counsel questioned Edgeworth about his identification of petitioner as one of the persons who had robbed him (R. 3). Edgeworth again said that, although he had not known petitioner's name, he had recognized him at the time of the robbery as a person he had seen before (R. 3). Counsel for petitioner then stated (R. 3):

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[2] A post-arraignment report briefly summarizing the charge of the complaining witness and stating that the complaining witness knew petitioner "because he served a year in Jail with the Def." was filed in the district court but was not used at the trial (R. 13–14).

[3] Occoquan is a District of Columbia workhouse in Virginia, near the District of Columbia, but was not so identified during the trial.

I believe you mentioned that you knew this man at Occoqu[a]n; is that right?

Government counsel immediately interposed the statement that the answer to which petitioner's counsel referred had been stricken from the record, and the trial judge thereupon struck the question (R. 3). Counsel for petitioner responded that he believed that he had the right to ask where the prosecuting witness had known the accused (R. 3). The judge suggested that counsel ask instead where the witness had first seen petitioner (R. 3). Counsel then asked a series of questions about the occasions on which the witness had seen petitioner prior to the robbery (R. 3–5).

Edgeworth responded that he had first seen petitioner some four or five years before the robbery at a bar in the northwest section of Washington, D.C., where they were both having a beer (R. 3–4). He testified that he had seen petitioner on other occasions in northwest Washington, but that petitioner was neither a friend nor an acquaintance of his (R. 5). The questioning concluded with the following colloquy (R. 5):

Q. Now, you described each and every time that you have seen Benny Lurk?

A. Yes.

Q. Other than these times at 7th and P Streets, you have never seen Benny Lurk, is that right?

A. Yes.

Q. You have seen Benny Lurk other than those times?

A. Yes.

Q. I thought you just got through——

The COURT. He told you yes, he saw him. Now pursue your question.

The WITNESS. Me and Benny done a year in Occoqu[a]n, that is why I knew him.

Q. What were you charged with?

A. Assault.

Q. You did a year in Occoquon?

A. That is right.

Q. You saw Benny there, you say?

A. Yes, I used to be the food adviser.

After closing arguments, the court instructed the jury as follows (R. 6):

> The court instructs you that you are to draw no inferences whatsoever as to the guilt of the defendant from the fact that the complaining witness, Mr. Edgeworth, testified that he and the defendant met at Occoqu[a]n.
>
> Testimony by the complaining witness in that respect is to be considered only in as far as it affects his credibility as a witness.

At the close of the full charge the judge asked counsel if they were satisfied with the instructions, to which counsel for petitioner replied that he was "satisfied" (R. 7). The jury returned a verdict of guilty, and petitioner subsequently filed a motion for a new trial, which was denied (R. 18).

On April 28, 1960, petitioner filed, *pro se*,[4] a motion for leave to proceed on appeal in forma pauperis, and on May 4, 1960, the motion was denied by the trial court "as plainly frivolous and not made in good faith" (R. 8, 18).

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[4] Appointed trial counsel was relieved, at his own request, on April 29, 1960 (R. 18).

All the foregoing proceedings were conducted by the Honorable Joseph R. Jackson, who had retired from the Court of Customs and Patent Appeals in 1952 (see 193 F. 2d xv, n. 5) and was sitting in the District Court for the District of Columbia under an assignment by the Chief Justice of the United States made pursuant to 28 U.S.C. 294(d).[5]

No question of the validity of Judge Jackson's assignment was raised during the trial.

2. *Proceedings in the court of appeals.*

On May 16, 1960, petitioner filed *pro se* in the Court of Appeals for the District of Columbia Circuit a petition for leave to prosecute an appeal without prepayment of costs (R. 8). He listed as reasons for his appeal the following points (R. 8–9):

> (1) denial of due process of law because of the appointment of incompetent counsel who failed to summon essential witnesses;
> (2) lack of probable cause for his arrest;
> (3) lack of positive identification;
> (4) denial of a fair and impartial trial; and
> (5) arrest on mere suspicion.

On May 18, the court of appeals appointed counsel to represent petitioner and file a memorandum in support of his petition (R. 9). On June 15, after examining the available court files and conferring

[5] The order of the Chief Justice of the United States assigning Judge Jackson to the United States District Court for the District of Columbia for the year 1960 is on file with the Clerk of the District Court, and it states that the assignment was made from the roster of available judges upon presentation of a certificate of necessity, as required by the statute governing assignment of retired judges to active duty, 28 U.S.C. 294(d).

with trial counsel and petitioner, appellate counsel filed a motion requesting a transcript at the expense of the government in order to determine whether the appeal was frivolous (R. 10–11). On July 8 the court ordered that "petitioner be allowed to prosecute an appeal without prepayment of costs to the extent of having the transcript of the proceedings in the District Court prepared without costs" (R. 12).

On August 31, 1960, counsel filed a memorandum in support of the petition for leave to prosecute an appeal in forma pauperis (R. 13–29). The memorandum stated that counsel found no substance in the five points on which petitioner based his application but asserted that two substantial questions were "posed by the record" (R. 19). These two questions were (1) whether references at the trial to petitioner's past criminal record constituted plain reversible error, and (2) whether the trial judge was properly assigned to conduct the trial.

The memorandum asserted, in some detail (R. 20–25), that the reference to "petitioner's criminal record" was "reiterated on several occasions", prejudiced the jury, and deprived petitioner of a fair trial (R. 21–22). It was further asserted that the error was plain and substantial, and was not cured by the instructions to the jury (R. 22–25).

The memorandum also raised the question whether it was a violation of the Constitution for a judge who retired from the Court of Customs and Patent Appeals prior to the 1958 declaration by the Congress that that court was a constitutional court to be assigned to sit in the District Court for the Dis-

trict of Columbia pursuant to an appointment under 28 U.S.C. 294 (R. 26–28). The memorandum acknowledged that the appointment was validly made under the applicable statute, but questioned whether the Constitution authorized the Congress to provide for such appointments (R. 27–28).

The government filed an opposition to petitioner's memorandum in which it pointed out that no objections were made by petitioner at the trial to the allusions to the fact that the complaining witness had known petitioner in prison, and that most of the references to that fact were elicited during cross-examination by petitioner's counsel (R. 30). The government also pointed out that the 1958 declaration by the Congress that the Court of Customs and Patent Appeals was a constitutional court made Judge Jackson, who had retired from that court in 1952, a retired judge of a constitutional court and hence that there was no problem in this case of the assignment of a retired judge of a legislative court to sit in a constitutional court. The government asserted that assigned counsel's memorandum presented no questions requiring leave to appeal in forma pauperis (R. 31).

Petitioner's counsel filed a reply in which he asserted that the only matter to be determined by the court of appeals was whether the issues presented in petitioner's memorandum were so plainly frivolous that the appeal would be dismissed if the same issues were raised by a non-indigent litigant (R. 32–33).

A three-judge panel of the court of appeals, after considering the "memoranda in support and the op-

position," denied without opinion the petition for leave to proceed in forma pauperis (R. 34).

SUMMARY OF ARGUMENT

I

A. Petitioner was accorded, in the court of appeals, the rights granted by 28 U.S.C. 1915, as interpreted by this Court. The court of appeals furnished petitioner the assistance of counsel by the prompt appointment of a competent and conscientious attorney. A motion for a transcript at government expense was also granted. After evaluation of the transcript, counsel abandoned the allegations of error propounded in the original application, and filed a memorandum urging instead two new matters which he briefed at some length. He also filed a reply to the government's memorandum in opposition. Thus, petitioner had the benefit of representation by counsel who, in the role of an advocate, placed before the court of appeals and argued those matters which he believed warranted the granting of leave to appeal without prepayments of costs. A three-judge panel of the court of appeals passed upon the case. By the transcript and memoranda of the parties, it was able to evaluate fully the claims advanced by petitioner. The denial of further leave to proceed in forma pauperis was thus surrounded by the protections to which this court has held an indigent entitled under 28 U.S.C. 1915.

B. Where a district court has denied leave to appeal in forma pauperis on direct appeal from a conviction, the question of frivolity often comes before the court of appeals at two points. At the first stage,

after appointing counsel, the court of appeals must decide if there is sufficient indication that a question meriting review will be raised to justify a request for the grant of a transcript. At that point it is reasonable to require that the request be granted unless the frivolousness of the issue is clearly apparent from the face of the application. *Johnson* v. *United States,* 352 U.S. 565; *Farley* v. *United States,* 354 U.S. 521; *Ellis* v. *United States,* 356 U.S. 674. However, once counsel has been appointed, a transcript obtained, and the issues briefed, the question is very similar to the question which confronts this Court when, having determined that certiorari should be granted or an appeal allowed, it decides whether the issues have been sufficiently clarified by the initial briefs to warrant summary determination without further argument on the merits. At this stage, the court of appeals, like this Court, is justified in denying further argument when in its opinion the issues presented have been sufficiently elucidated so that further review would unnecessarily consume the court's time. Petitioner has received as full review on the matters presented in counsel's memorandum as that to which a non-indigent would be entitled under the same circumstances. The sole element present in ordinary appellate proceedings which was here absent was oral argument, an omission which does not deprive petitioner of any constitutional right. *Price* v. *Johnston,* 334 U.S. 266; *Federal Communications Commission* v. *WJR, the Goodwill Station,* 337 U.S. 265. That this situation arises more frequently in this class of indigent appeals than in non-indigent appeals stems from the fact that in non-indigent

cases there is seldom the preliminary briefing and analysis necessary in indigent cases (of the present type) under 28 U.S.C. 1915. The non-indigent cases do not normally reach the appellate judges for consideration, as a court, until after oral argument. The same is true of indigent appeals in which the trial court grants leave to proceed in forma pauperis.

C. The issues raised by petitioner did not warrant further briefing and argument.

1. The allegation that there was reversible error resulting from the allusions to petitioner's imprisonment was, in light of the transcript, frivolous. Although the evidence was admissible since it went to the question of identity, government counsel, to whom the complaining witness' answer came as an obvious surprise, promptly moved to strike the answer. All other allusions to the fact that petitioner and the complaining witness had known each other at Occoquan (the District of Columbia workhouse) were made by petitioner's counsel in his behalf. In addition, defense counsel properly expressed himself as satisfied with the judge's instructions that the jury was to consider this testimony only as it related to the credibility of the complaining witness.

2. The court of appeals had no reason to require further argument on the authority of Judge Jackson to act.

a. The precise issue raised by petitioner in the court below was whether the Congressional declaration of 1958, in 28 U.S.C. 211, that the Court of Customs and Patent Appeals is a constitutional court, gave Judge Jackson, already a retired judge of that

court, the status of a retired judge of a constitutional court. No point was made as to the status of the Court of Customs and Patent Appeals or of its active judges after the 1958 enactment, or as to the power of Congress to declare the Court, in 1958, to be established under Article III of the Constitution. If, as petitioner assumed below, the Court of Customs and Patent Appeals became an Article III court in 1958 and its active judges became Article III judges, then Judge Jackson, as a retired judge, certainly became an Article III judge at the same time, along with the active judges. See *Booth* v. *United States,* 291 U.S. 339, 350–351.

b. Moreover, although the argument was not presented to it by the government, the court of appeals could well have deemed the issue before it precluded by the *de facto* principle, since admittedly Judge Jackson was assigned under the provisions of 28 U.S.C. 294(d) (App. A, *infra,* p. 129). It is well settled in all American jurisdictions in which the question has arisen (including the federal courts) that a judge appointed in due course under a subsisting statute to an existing judicial office is at least a judge *de facto* whose right to sit may not be questioned for the first time on appeal.

c. Third, regardless of whether the Court of Customs and Patent Appeals, as a court, is or was a legislative or an Article III court, Judge Jackson was competent to sit in petitioner's case because, at least since the 1958 Act, he has been an Article III judge. Judge Jackson has had a lifetime appointment and his duties are, and have been, judicial in nature. What-

ever else it may accomplish, the 1958 Act on the Court of Customs and Patent Appeals is properly read, at the very least, as a declaration by Congress that it was giving up whatever power it had to end the appointment of judges of that court or to reduce their salaries. If they were not previously judges competent to sit on an Article III court, they have become so as a result of that Act.

On any of these three grounds, the court of appeals could decide that it did not need further argument.[6] And on any one of them, the court could properly decide that this conviction should not be disturbed.

II

Petitioner's conviction should not be reversed merely because Judge Jackson presided at his trial. As indicated above, there are at least four separate reasons for the conclusion—three of which we shall discuss more fully in this Point.

A. The *office* which Judge Jackson held during the petitioner's trial—the office of District Judge of the District Court for the District of Columbia—is admittedly a lawful or *de jure* one. The designation of Judge Jackson by the Chief Justice of the United States to sit on the District Court was made under and in accordance with 28 U.S.C. 294. Pursuant to that designation, Judge Jackson, in good faith, filled the office of district judge and exercised the normal

[6] There is also a fourth ground for holding that Judge Jackson's participation in the trial was valid—*i.e.*, that the Court of Customs and Patent Appeals is and has always been a constitutional court—but we do not contend that, on that issue, the court below could properly have decided that further argument would be superfluous.

judicial functions incident thereto. Under these circumstances, Judge Jackson was, at the least, a *de facto* judge whose title to office and whose exercise of authority are not subject to challenge by the petitioner on appeal.

The rule is settled in the federal courts that where a judge, in good faith and under color of authority, is in actual possession and discharging the duties of a *de jure* office, a party litigant has no standing (at least on appeal) to challenge the title of the judge to hold the office or his exercise of judicial authority, whether he is regularly or temporarily filling the office. *Ex parte Ward,* 173 U.S. 452; *McDowell* v. *United States,* 159 U.S. 596. This doctrine is grounded upon principles of public policy to avoid the confusion, uncertainty, and delay which would result from challenges to the authority of public officers.

The title to office or the exercise of judicial authority of a *de facto* judge may normally be challenged only in a direct proceeding—usually in the nature of a *quo warranto* action—instituted by the sovereignty in whose name the judge is exercising judicial authority. Cf. *Ball* v. *United States,* 140 U.S. 118. In such a proceeding, the judge is formally made aware of the challenge to his title and is afforded an opportunity to defend his position. In the District of Columbia, that would be done under 16 D.C. Code 1601–1608 which provides that the Attorney General of the United States or the United States Attorney for the District of Columbia may institute, either on their own motion or on the relation of a third party, a proceeding in *quo warranto* to try the title to hold office; or

should the Attorney General or the United States Attorney refuse or fail to act in the matter, a third party may institute similar proceedings by filing a verified petition in the District Court for the District of Columbia.

B. Our second contention is that, regardless of the status of the Court of Customs and Patent Appeals as a court, Judge Jackson is and has been, at least since 1958, an Article III judge fully competent to sit on the District Court for the District of Columbia. Judge Jackson has all the qualifications of an Article III judge. He has life tenure and performs judicial duties, at least primarily. The provision of the 1958 Act (part of 28 U.S.C. 211, App. A, *infra*, p. 128) that the Court of Customs and Patent Appeals "is hereby declared to be a court established under article III of the Constitution of the United States" means, at the very least, that Congress has irrevocably given up whatever power it may have had to reduce the compensation or terminate the appointment of the judges of that court (including its retired judges). If they were not such before, since the 1958 statute those judges have been Article III judges in the same category as the judges appointed to the various district courts and courts of appeals.

No difficulty is raised by the fact that Judge Jackson may also be called to sit in a legislative court (if the Court of Customs and Patent Appeals be deemed such). On that tribunal, his duties would be primarily if not entirely judicial, and the issues with which he would be concerned would arise under the Con-

stitution and laws of the United States. Article III judges may constitutionally exercise judicial power not stemming from Article III, at least so long as it is of the same kind as the powers specified in that Article. And Article III *judges* (as distinguished, perhaps, from Article III *courts*) may also validly perform certain non-judicial functions—as the course of our history proves. See *infra*, pp. 27–30.

Any claim that Article III and non-Article III functions cannot be mixed is certainly incorrect for the District of Columbia District Court—on which Judge Jackson has been sitting. It is clear that the judges of the Superior District of Columbia courts may exercise both judicial and non-judicial functions, as well as both Article III and non-Article III functions. *O'Donoghue* v. *United States*, 289 U.S. 516; *Keller* v. *Potomac Electric Co.*, 261 U.S. 428. Under our view, the judges of the Court of Customs and Patent Appeals would remain Article III judges even if Congress abolished the court and ended or transferred its functions. See *Donegan* v. *Dyson*, 269 U.S. 49.

C. Thirdly, the Court of Customs and Patent Appeals was created by Congress as, and has always been, an Article III court.

1. It is significant that Congress, by the Act of August 25, 1958, has declared the Court of Customs and Patent Appeals to be a court which had been established under Article III of the Constitution.

(*a*). The language of the 1958 amendment shows that its purpose was not to *make* the Court of Cus-

toms and Patent Appeals an Article III court, but to declare that it was such a court—that it had been from its creation such a court.

(*b*). The legislative history of the measure confirms this purpose. In 1953 and 1956, Congress enacted with respect to the Court of Claims and the Customs Court the identical legislation which it enacted in 1958 for the Court of Customs and Patent Appeals. All three statutes must be read *in pari materia*. The committee reports accompanying the bills which eventuated in these measures, as well as the pertinent debates, clearly disclose the declaratory purpose of the enactments. For example, the House Judiciary Committee, in reporting out the bill to declare the Court of Claims to be a court established under Article III, stated that its purpose was to "declar[e] unequivocally" that the Court of Claims "was in fact established as, and continues to be, a constitutional court." A companion Senate bill was rejected because it was open to the interpretation that it "undertook to change the status of the Claims Court from a legislative court to a constitutional court." The legislative materials relating to the later bills show that it was the purpose of those bills to do for the Customs Court and the Court of Customs and Patent Appeals what the earlier bill had done with respect to the Court of Claims.

2. The Court of Customs and Patent Appeals was in fact created by Congress as an Article III court.

(*a*). The court's history shows that Congress so established it.

(*1*). The pertinent factors are these:

i. The court was created in 1909 to review the customs decisions of the Board of General Appraisers (now the Customs Court). A presiding judge and four associate judges, a court reporter, and the publication of the court's decisions were provided for. The terms of the Act establishing the court (pertaining to such matters as the appointment of a clerk and marshal, the court seal, writs, and allowable costs and fees) are strikingly similar to those of the Act which created the circuit courts of appeals, indisputably Article III courts.

ii. The President was given limited authority, at the request of the presiding judge, to designate circuit or district judges to sit temporarily in the event of vacancies or the temporary inability or disqualification of a judge or judges—a power later broadened and generalized, and transferred to the Chief Justice.

iii. As in the case of the Act which created the district and circuit courts and implemented the creation of this Court by defining the number of its judges and the number needed to constitute a quorum, no provision applicable to the tenure of the judges was included. It was assumed throughout the debates on the bill, and thereafter, that the judges would hold office during good behavior.

iv. The court was given "exclusive appellate jurisdiction" to review all final decisions of the Board of General Appraisers in cases respecting the classification of merchandise and rates of duty, including all appealable questions as to the jurisdiction of the Board and the laws and regulations governing the

collection of the customs. This jurisdiction had previously been exercised by the circuit courts, the circuit courts of appeals, and this Court. The debates in Congress, moreover, reflect with clarity Congress's awareness that the jurisdiction of the new court would be carved from jurisdiction previously exercised by the regular federal courts. Provision was also made for the transfer to the new court, for review, of cases pending in the circuit courts and circuit courts of appeals at the time of the Act's passage (including cases which had been decided by the circuit courts). As a consequence, many of the decisions of the Court of Customs Appeals during the early years of its existence involved cases transferred from the circuit courts and circuit courts of appeals, including many appeals from actual decisions of the circuit courts.

v. The $10,000 salary initially fixed for the judges of the court was reduced to $7,000 before the court was staffed. The latter figure was the salary then being received by circuit judges. In subsequent Acts raising judicial salaries, the judges of the Court of Customs Appeals have been treated on a par with circuit judges. The salaries established for judges of the Court of Customs Appeals have always been greater than those fixed for district judges.

vi. When the Judicial Code was enacted in 1911, the provisions pertaining to the Court of Customs Appeals were transferred to the Code, together with the provisions relating to the district courts, the circuit courts of appeals, the Court of Claims, the former Commerce Court, and this Court.

vii. In 1914, this Court was given limited certiorari jurisdiction to review cases from the Court of Customs Appeals. Since 1930, this Court has had general certiorari jurisdiction with respect to customs cases from that court, and has exercised it.

viii. In 1922, the judges of the Court of Customs Appeals were made eligible, on designation of the Chief Justice of the United States, for service on the superior courts of the District of Columbia (subsequently held, in *O'Donoghue* v. *United States,* 289 U.S. 516, to be Article III courts). In 1958, this eligibility was broadened to include service on any court of appeals, any district court, the Court of Claims, and the Customs Court.

ix–x. Also in 1922, the jurisdiction of the Court of Customs Appeals was enlarged to include appeals on questions of law from findings of the Tariff Commission in proceedings relating to unfair practices in the import trade. And, in 1929, the patent and trade-mark jurisdiction of the Court of Appeals of the District of Columbia was transferred to the Court of Customs Appeals and the name of the court was changed to the Court of Customs and Patent Appeals.

(*2*). The conclusion to be drawn from the foregoing summary is that it was the congressional purpose, in creating the Court of Customs Appeals, to establish an Article III tribunal, with limited subject-matter jurisdiction but general geographical jurisdiction—the converse, in this respect, of the regular federal courts. Briefly recapitulated, the indicia of this intent are: (*i*) the federal and judicial nature of the subject matter (customs cases) originally commit l

to the court; (*ii*) the parallel between the language creating the court and that creating the circuit courts of appeals; (*iii*) the eligibility, from the beginning, of circuit and district judges to sit on the court; (*iv*) the life tenure of its judges from the beginning; (*v*) the fact that the court's jurisdiction was carved from the jurisdiction of the regular federal courts and that provision was made for the transfer to the new court of cases pending in the circuit courts and circuit courts of appeals on the effective date of the new court's creation (including cases which had been decided by the circuit courts, so that, as to such cases, the new court sat in review of the circuit courts); (*vi*) Congress's treatment of the court's judges from the beginning as on a par with circuit judges in matters of salary; (*vii*) the eligibility, since 1922, of its judges to sit on the superior courts of the District of Columbia—an eligibility since broadened to include service on any court of appeals or district court.

(*b*). We submit that *Ex parte Bakelite Corporation,* 279 U.S. 438—holding the Court of Customs Appeals to be a legislative court, created by Congress under its Article I power to lay and collect duties on imports, and deriving none of its authority from Article III—reached an erroneous conclusion from mistaken premises and failed adequately to take into account the pertinent historical materials.

(*1*). The basic premises of the *Bakelite* opinion were (a) that a court in which Congress vests jurisdiction which it is not required to vest in a court is necessarily a legislative tribunal, and (b) that Congress created the Court of Customs Appeals under Article I, not Article

III. In our view, both of these assumptions were mistaken.

(2). There is no principle requiring Congress to vest in Article III courts only those matters "which inherently or necessarily require judicial determination," and prohibiting it from requiring Article III judicial determination of matters capable of administrative settlement. There are many areas in which Congress can choose to provide either a judicial remedy or an administrative procedure. The practice of many decades gives firm support to this principle. A substantial part of the business of the federal district courts consists of matters which Congress could clearly commit to executive or administrative determination but has chosen to bring within judicial cognizance, *e.g.*, money, contract, and tort claims against the government. Conversely, a number of present-day administrative tribunals carry on functions which could be, and have in the past been, vested in Article III courts. In some instances, too, the courts and administrative agencies now have concurrent or coordinate jurisdiction.

None of the decisions cited in the *Bakelite* opinion to sustain its premise that only legislative courts can "examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it" (279 U.S. at 451) suggests that proposition. And in the most recent case discussing legislative tribunals (*National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582), each of the four opinions (expressing various views) rejected, ex-

plicitly or implicitly, the notion that Article III courts are barred from considering matters not "inherently or necessarily" *requiring* "judicial determination."

(*3*). The second major premise of the *Bakelite* opinion—that Congress created the Court of Customs Appeals under Article I, not Article III—is equally untenable. The history we have detailed above shows that Congress thought and assumed it was acting to create a special inferior court under Article III. The creation of such a special Article III court to exercise a particular type of jurisdiction is not at all foreign to our history.

(*4*) Whatever doubt might remain as to the soundness or unsoundness of the *Bakelite* decision, apart from the 1958 declaration of Congress that it established the Court of Customs and Patent Appeals under Article III, ought now to be resolved in favor of the correctness of the congressional conclusion stated in that declaration—*i.e.*, that *Bakelite* mistakenly construed the effect and intent of Congress's action in establishing the court.

3. Finally, we submit that there is no constitutional obstacle to the conclusion that the Court of Customs and Patent Appeals was validly established by Congress under Article III.

(*a*). The customs jurisdiction of the court—its sole initial jurisdiction—has always been purely judicial in character, involving cases arising under the Constitution, laws, and treaties of the United States, and controversies to which the United States is a party.

(1). *"Cases" and "controversies."*—The sole jurisdiction of the court at the time of its creation in 1909, and during the first thirteen years of its existence, was the hearing of appeals from final decisions of the Board of General Appraisers (now the Customs Court) in classification and rate-of-duty cases arising under the customs laws of the United States. Its judgments in such cases have always been final. There can be no doubt that this jurisdiction embraced, and embraces, "cases" within the meaning of Article III. This is confirmed by the fact that this jurisdiction was carved from authority previously exercised by the regular federal courts and that this Court, since it was first given the power in 1914, has many times reviewed customs judgments of that court.

(2). *"Arising under this Constitution, the Laws of the United States, and Treaties."*—There can also be no doubt that the "cases" with which the court deals in its customs jurisdiction arise "under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"—within the terms of Article III, Section 2. The *Bakelite* opinion did not intimate any other view, and the rationale of the opinions in *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, confirms it.

(3). *"Controversies to which the United States shall be a Party."*—At least the customs decisions of the court also fall within this category of cases and controversies defined in the second section of Article III. In *Williams* v. *United States*, 289 U.S. 553, 571–

580, this Court, overruling prior statements, construed the phrase "Controversies to which the United States shall be a Party" as embracing only controversies to which the United States is a party *plaintiff*. In *Pope* v. *United States*, 323 U.S. 1, the government urged that this interpretation was incorrect (but the Court found it unnecessary to reach that question). We adhere to that position. History shows no intention to withhold from the federal courts jurisdiction over claims *against* the government. The flaw in the reasoning in the *Williams* case is the failure to distinguish the bestowal of judicial power from the waiver of sovereign immunity. The premise that Article III is not a consent to suit is correct; but it does not follow that, where such consent is given, a suit against the government is not a "controversy to which the United States shall be a party." While sovereign immunity was well known at the time of the framing of the Constitution, it was equally known that such immunity could be, and had been, waived both in England and here. Hamilton specifically recognized that a sovereign may be sued if it consents, and Madison and Marshall, in the Virginia debates on the Constitution, acknowledged that, if a state consents to be sued by a foreign nation, Article III would authorize jurisdiction in the federal courts over such a suit as a controversy "between a State * * * and foreign States." There is no reason to believe that the parallel clause providing jurisdiction where the United States is a party had a narrower scope.

(*b*). The subsequent vesting in the Court of Customs Appeals of jurisdiction over matters which may

not constitute "cases" within Article III, Section 2, did not affect its Article III status.

(*1*). It was not until 1922, thirteen years after its creation, that the court was first vested with jurisdiction over a matter which may not involve the adjudication of a case or controversy within Article III, Section 2. This was the power, conferred by the Tariff Act of that year, to hear appeals from findings of the Tariff Commission, on questions of law, in proceedings relating to unfair practices in the import trade. Regardless of whether such appeals present justiciable cases, the conferring of such jurisdiction—which historically has represented a very small fraction of its total business—could not have affected the Article III character of the court if, as we have argued, it had that status previously. But, for the reasons we shall indicate, we do not believe that the vesting of this additional jurisdiction—even assuming its non-justiciable character—was inconsistent with the court's Article III status.

(*2*). The court's patent and trade-mark jurisdiction was transferred to it in 1929 from the Court of Appeals of the District of Columbia. This jurisdiction was held to be non-judicial in *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693 (decided prior to the transfer). But see *United States* v. *Duell*, 172 U.S. 576, an earlier decision (not referred to in the *Postum Cereal* case) which stressed the essentially judicial character of such jurisdiction, notwithstanding that the decision of the court aided an administrative body in making a determination committed to it by Congress. Moreover, the fact that a patent

which was issued following an appeal to the District of Columbia Court of Appeals was later challengeable in any court (the principal basis for this Court's conclusion as to the non-judicial character of the Court of Appeals' patent jurisdiction) would not appear to constitute a sound reason for that conclusion, since the same was true with respect to a patent issued pursuant to a proceeding in equity to secure the issuance of a patent—an alternative remedy of unquestionably judicial character.

(*3*). Even if one accepts the *Postum Cereal* decision as having settled the non-Article III character of the patent and trade-mark jurisdiction now exercised by the Court of Customs and Patent Appeals, the transfer to it of that jurisdiction was not inconsistent with its Article III status.

O'Donoghue v. *United States*, 289 U.S. 516, indicates that the possession by a federal court of some powers and functions not strictly judicial in character is compatible with its status as an Article III tribunal. That decision, holding the superior courts of the District of Columbia to have been established under Article III, recognized the authority of Congress, under its plenary power to legislate for the District, to vest in the courts of the District, in addition to their Article III judicial functions, administrative and legislative powers. We submit that the rationale of the *O'Donoghue* case is equally applicable to the Court of Customs and Patent Appeals. That court has its headquarters at the seat of government, within the area over which Congress possesses exclusive power to legislate. Congress can, pursuant to

the same authority which it exercises in conferring non-judicial powers on the courts of the District, constitutionally vest similar powers in the Court of Customs and Patent Appeals, as if that court were for these purposes a superior court of the District. This is by no means a far-fetched concept, particularly since the court's patent and trade-mark jurisdiction did actually come directly from the District Court of Appeals.

In addition, we suggest that Congress may properly draw upon its other Article I powers in adding non-judicial functions to the Court of Customs and Patent Appeals. The patent, commerce, and customs duties clauses of Article I, Section 8—granting authority to legislate generally in the field of patents, trade-marks, and customs—s[illegible]ain the establishment of such non-judicial machinery. It is true that this Court and individual Justices have rejected, in general terms, the exercise by federal courts, other than the District of Columbia courts, of non-judicial functions. But the Court's concern for the nationwide federal court system suggests that there well may be a difference, with respect to joinder of non-judicial with judicial functions, between the regular federal courts and special constitutional tribunals. The reasons impelling the Court to protect the regular federal courts against non-judicial encroachment apply with less force to the specialized tribunals with their limited functions and areas of responsibility. It seems an unduly rigid interpretation of the Constitution to hold that Congress cannot combine in a particular tribunal, designed for a special field, both the neces-

sary Article III powers and also certain "non-judicial" functions, especially if the latter are closely akin to judicial powers (as is the case with the so-called "non-judicial" jurisdiction of the Court of Customs and Patent Appeals).

ARGUMENT

I

THE DENIAL OF LEAVE TO PROCEED IN FORMA PAUPERIS MET THE REQUIREMENTS OF 28 U.S.C. 1915

The threshold question in this case is whether petitioner has received, in the court of appeals, the full benefit of the provisions of 28 U.S.C. 1915 for forma pauperis appeals (App. A, *infra*, pp. 127–128). We believe that petitioner has been given his rights under the general principles of Section 1915, as interpreted by this Court. He has had counsel assigned to him, a transcript made at government expense, the benefit of extended written argument by counsel, and adequate consideration by a three-judge panel of the issues raised. He is entitled to no more.

A. Petitioner's contentions, adequately presented by counsel on the basis of the trial record, were reviewed by a three-judge panel of the court of appeals.

1. *Petitioner had the benefit of counsel and of the trial record.*

The court of appeals furnished petitioner the assistance of counsel by the prompt appointment of a competent and conscientious attorney (R. 9). Counsel made a careful investigation of the points raised by petitioner in his *pro se* application, and concluded

that in order fully to protect petitioner's interests a transcript of the trial record would be required. A motion for the transcript was granted (R. 10–12).

After evaluation of the transcript, counsel abandoned the allegations of error propounded in the original application, and filed a memorandum urging instead two new matters only tangentially or inferentially related to those asserted in the first application (R. 19). He informed the court that such substance as there was in the specifications of error in the *pro se* application (*supra*, p. 7) was incorporated in the first question urged in the memorandum: that it was error to have allowed any reference to petitioner's prior imprisonment. The second question which counsel urged as requiring further review, that of the constitutionality of Judge Jackson's assignment to the district court, was a clear result of counsel's advocacy of petitioner's right to appellate review, since this question had not been raised below, nor did counsel find it to be implicit in any of the questions raised in the original petition.

Counsel briefed at some length the two issues he believed required appellate review (R. 13–29), the substance of which we shall consider later (*infra*, pp. 40–49). In addition, counsel filed a reply memorandum to the government's memorandum in opposition to the granting of the petition (R. 32–33).

Thus, as required by this Court, petitioner had the benefit of representation by counsel who, in the role of an advocate, placed before the court of appeals and argued those matters which he believed warranted the granting of leave to appeal without pre-

payment of costs. See *Ellis* v. *United States*, 356 U.S. 674; *Johnson* v. *United States*, 352 U.S. 565; *Johnson* v. *Zerbst*, 304 U.S. 458.

2. *A three-judge panel of the court of appeals considered petitioner's contentions.*

Since a transcript had been provided, both counsel and the court were enabled to determine whether the conduct of the trial had deprived petitioner of any rights. Counsel utilized the transcript to discover matters which petitioner failed to urge *pro se*, thereby providing petitioner with a scrupulous examination of any possible error which might entitle him to a reversal of the conviction. Those events upon which the claim of error was predicated were reproduced verbatim in counsel's memorandum (R. 16–18) and, in addition, the memorandum contained a summary of all of the testimony at petitioner's trial (R. 14–16).

The court which passed upon petitioner's appeal was a three-judge panel of the court of appeals. As we have indicated, that court had called to its attention all those matters upon which counsel's advocacy of the reversal of the judgment of conviction was based. The transcript and other materials, such as petitioner's memoranda and the government's opposition, enabled the court to evaluate fully the claims advanced by petitioner.[7] The denial of leave to proceed further in forma pauperis, based upon these mate-

[7] We are informed that even though, in the absence of the docketing of an appeal, the trial record is not formally before the court of appeals, in fact the entire jacket from the district court is sent to the court of appeals when a petition for leave to proceed in forma pauperis is filed in that court.

rials, was surrounded by all the protections to which this Court has held an indigent entitled under 28 U.S.C. 1915. See *Farley* v. *United States*, 354 U.S. 521; *Johnson* v. *United States*, 352 U.S. 565; cf. *Edwards* v. *United States*, 355 U.S. 36.

B. *A court of appeals need not grant leave to proceed further in forma pauperis once it is satisfied, on the basis of an adequate presentation of the appellant's contentions, that the issues raised do not warrant further briefing and argument.*

1. Where a district court has denied leave to appeal in forma pauperis on direct appeal from a conviction,[8] the question of frivolity often comes before the court of appeals at two points. At the first stage, after appointing counsel, the court of appeals must decide if there is sufficient indication that a question meriting review will be raised to justify a request for the grant of a transcript.[9] At that point, where the decision must to a large extent be made on the basis of potentialities, it is reasonable to construe the term "frivolous" liberally in favor of the defendant and to grant the request unless the frivolousness of the issues be clearly apparent from the face of the application. That is the teaching of

[8] The certificate of the trial court that petitioner's *pro se* application in that court for leave to proceed in forma pauperis was frivolous and not made in good faith is not here at issue, although its propriety is confirmed by the fact that counsel appointed by the court of appeals abandoned petitioner's *pro se* allegations of error because they were not supported by the record (R. 19).

[9] Proceedings of the kind here involved were characterized by the First Circuit as a "preliminary appeal". *O'Rourke* v. *United States*, 248 F. 2d 812, certiorari denied *sub nom. Doran* v. *United States*, 356 U.S. 922.

this Court's decisions in *Johnson* v. *United States*, 352 U.S. 565; *Farley* v. *United States*, 354 U.S. 521; and *Ellis* v. *United States*, 356 U.S. 674.

However, once counsel has been appointed, a transcript obtained, and the issues briefed (even though preliminarily), the court of appeals is confronted with a very different situation. In reality, the question then is—whatever terminology one employs—whether there is need for still further briefing and for oral argument. It is very similar to the question which confronts this Court when, having determined that certiorari should be granted or an appeal allowed, it decides whether the issue has been sufficiently clarified by the initial briefs to warrant summary determination without further argument on the merits. This is not an uncommon practice by this Court. See, *e.g.*; *Kreshik* v. *St. Nicholas Cathedral*, 363 U.S. 190; *Sims Motor Transportation Lines, Inc.* v. *United States*, 362 U.S. 637; *Wabash Railroad Co.* v. *Commercial Transport, Inc.*, 361 U.S. 1; *Beard* v. *Ohio*, 361 U.S. 4; *Womack* v. *Ohio*, 361 U.S. 5; *Smith* v. *United States*, 361 U.S. 13; *Harris* v. *Pennsylvania Rd. Co.*, 361 U.S. 15; *United States* v. *Haley*, 358 U.S. 644; *United States* v. *Lane Motor Company*, 344 U.S. 630.[10] At this stage, the court of appeals, like this Court, is justified in denying further argument when in its opinion the issues presented have

[10] Rule 16(1)(e) of this Court's Rules provides that the Court "will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

been sufficiently elucidated so that further review would unnecessarily consume the court's time.[11] Where, as here, there has been extensive briefing which reveals the insubstantiality of the claims of error or the lack of a justiciable question, there is no reason to require additional review by the court through formally docketing the appeal, receiving further briefs, and hearing oral argument.[12]

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[11] In arguing that the court of appeals below has attempted to avoid the standards fixed by this Court, petitioner and counsel *amicus curiae* cite a number of cases in which this Court has summarily reversed denials by that court of leave to proceed in forma pauperis. Most of these cases, however, were decided by the court of appeals prior to this Court's particularized enunciation of standards in *Ellis* v. *United States*, 356 U.S. 674, and therefore cannot substantiate an assertion of attempts to circumvent that holding. *Edwards* v. *United States*, 355 U.S. 36; *Hill* v. *United States*, 356 U.S. 704; *Cash* v. *United States*, 357 U.S. 219; *Hansford* v. *United States*, 357 U.S. 578. In *McAbee* v. *United States*, 361 U.S. 537, counsel had not been appointed and the Solicitor General did not oppose remanding the case for the appointment of counsel and the determination of certain issues which had not been considered by the court of appeals. In *Smith* v. *United States*, 358 U.S. 281, there was an issue as to whether assigned counsel, who had been trial counsel, acted as an advocate in the court of appeals (see Brief in Opposition, 192 Misc., O.T. 1958). Thus, only *Smith* v. *United States*, 361 U.S. 38, can be said to be a decision since *Ellis* which represents an overruling of the decision of the court of appeals that further review was not warranted, and in that case there was disagreement on the question within the circuit.

[12] This Court has declined to review cases from other circuits denying leave to appeal in forma pauperis where the court of appeals has, as here, examined a question which could not be said to be *per se* frivolous on its face, but which was found to be so in the context of the proposed appeal. See, *e.g.*, *United States* v. *Visconti*, 261 F. 2d 215 (C.A. 2), certiorari denied, 359 U.S. 954; *Weber* v. *United States*, 256 F. 2d 119.

2. The historic concern for the rights of indigents in the courts of law, in both civil and criminal matters, has been to insure that the fact of indigency does not deprive the party of his full measure of justice. This principle has rightly moved Congress and this Court to provide the protections we have discussed. But it has also been a matter of concern that those remedies which mitigate the rigors of poverty do not also open the floodgates to frivolous and unsubstantial proceedings. See Jacoby, *Legal Aid to the Poor*, 53 Harv. L. Rev. 940 (1940). The Congress, in allowing appeals in forma pauperis, included the express provision that such appeals would not be granted if in bad faith or frivolous. See 45 Cong. Rec. 1532–1534, 1767 (1910); see also *Wells* v. *United States*, 318 U.S. 257. Unless the screening process provided by Congress is to be limited solely to those questions which, from their mere statement, are seen as devoid of all merit as a matter of law or of immediately apparent fact, a court of appeals which has had issues presented to it preliminarily—on the record and with briefs of counsel—may properly decline to permit further proceedings in forma pauperis when it decides that further briefing and argument are unnecessary.

For instance, although it might not be apparent, absent the transcript, that there was sufficient evidence to sustain the verdict or that the trial judge

(C.A. 8), rehearing denied, 257 F. 2d 585, certiorari denied, 358 U.S. 912; *O'Rourke* v. *United States*, 248 F. 2d 812 (C.A. 1), certiorari denied *sub nom. Devoán* v. *United States*, 356 U.S. 922.

gave a proper charge on some contested issue, the record of the trial (coupled with counsel's presentation of his points) might well make it manifest that the defendant had no case. In such an event, we do not believe that the appellate court would be compelled to set the case down for argument, receive and consider further briefs, and delay appellate disposition for no substantial end. Similarly, if the opposing positions on some issue of law are sufficiently set forth so that the court feels ready and able to reject the defendant's contention without further argument, there is no need and no point to permitting further proceedings. In all cases, the significant question is whether the appellate court has had the opportunity to evaluate the defendant's case on the basis of all the materials it properly needs. Once it has obtained all those materials and has determined that nothing further is necessary to help it decide, it is not required to let the defendant proceed further.

3. As we show below (*infra*, pp. 40–49), we believe that, on the questions enunciated in the memorandum of petitioner's counsel in the light of this record, a non-indigent's appeal would have been subject to dismissal or summary affirmance (see, *e.g.*, *United States* v. *Johnson*, 327 U.S. 106; *Sykes* v. *United States*, 224 F. 2d 313 (C.A. 4); *United States* v. *Esters*, 161 F. Supp. 203 (W.D. Ark.)). Petitioner has received as full a review on the matters presented in counsel's memorandum as a non-indigent would be entitled to receive under the same circumstances. His poverty has not prevented appellate determination of this case on an

adequate record and after adequate presentation. Cf. *Eskridge* v. *Washington State Board of Prison Terms and Pardons*, 357 U.S. 214, 216; *Griffin* v. *Illinois*, 351 U.S. 12; *Burns* v. *Ohio*, 360 U.S. 252; *Smith* v. *Bennett*, Nos. 174, 177, this Term, decided April 17, 1961. The sole element usually present in ordinary appellate proceedings which was here absent was oral argument, an omission which does not deprive petitioner of any constitutional right.[13] *Prince* v. *Johnston*, 334 U.S. 266; *Federal Communications Commission* v. *WJR, the Goodwill Station*, 337 U.S. 265.

Petitioner attempts to draw invidious comparisons between the treatment by the court below of this class of indigent appeals and non-indigent appeals, because so few non-indigent appeals are dismissed or summarily affirmed without oral argument.[14] This overlooks the cardinal fact that in non-indigent appeals (as well as in indigent appeals in which the trial court grants leave to proceed) there is seldom preliminary briefing and analysis, as is necessary (under 28 U.S.C. 1915) in this class of indigent cases in which the appellate court must decide

[13] Rule 19 of the Rules of the United States Court of Appeals for the District of Columbia Circuit provides that oral argument may be waived if counsel chooses and that the court may terminate oral argument if the court feels such argument is not necessary. Rule 31(a) of the court's Rule provides that there will be no oral argument on motions.

As indicated above (p. 34), it is not uncommon for this Court to dispense with oral argument.

[14] It should be emphasized that many forma pauperis appeals (those in which the district court grants leave to proceed) proceed in ordinary course. The problem of this case involves only those indigent appeals which the district court has found frivolous and in which the defendant then applies to the court of appeals. And even in that class the courts of appeals often grant leave to proceed at the outset.

whether to allow the defendant to proceed in forma pauperis. In the other groups of cases, the matter is not normally called to the judges' attention until after all the briefs on the merits have been filed and distributed;[15] even then, no formal action by the court is called for until after argument, and there is no routine procedure by which the court decides for itself whether oral argument is unnecessary. Accordingly, once the briefs are submitted, it is usually as expeditious to proceed to the oral hearing. See *Young* v. *United States*, 267 F. 2d 692, 693 (C.A.D.C.). But the review actually granted the appellant in such a case is, in reality, no greater.

It is true that the government has not often moved to dismiss non-indigent appeals or for summary affirmance[16]—because it is usually easier and just as quick to proceed in normal course, rather than to file an unusual motion to dismiss—but the fact that the government fails to take such appropriate action with respect to non-indigents does not mean that an indigent is prejudiced when appropriate action is taken as to him. As this Court said in another context, a problem may be dealt with "* * * where it is seen, without providing for others which are not so

[15] Unlike this Court, the courts of appeals, whose jurisdiction is almost wholly obligatory, do not ordinarily have to decide whether to take or hear a case, and accordingly do not have the equivalent of this Court's conferences at which certiorari is granted or denied, probable jurisdiction noted, or the decision below affirmed summarily.

[16] Rule 39(a), F.R. Crim. P., provides that the "appellate court may at any time entertain a motion to dismiss the appeal, * * *", and courts of appeals likewise entertain, on occasion, motions for summary affirmance.

evident or so urgent". *Hirabayashi* v. *United States*, 320 U.S. 81, 100. This is especially so in the District of Columbia, where the courts must deal, as in the states, with the prosecution of the ordinary local types of crimes and where the workload of the court of appeals is increased by the filing of approximately one forma pauperis application per working day of each term. See *Surratt* v. *United States*, 262 F. 2d 691 (C.A.D.C.), dissent by Prettyman, C.J.; cf. *Young* v. *United States*, 267 F. 2d 692, 695 (C.A.D.C.); *Jones* v. *United States*, 266 F. 2d 924, 926 (C.A.D.C.). In this class of forma pauperis cases,[17] there does exist perforce a standing mechanism, under the statute, for culling the particular litigations which should be stopped short of oral argument. Its continued and careful use does not represent any denial of equal justice, just because no similar standing mechanism exists for non-indigent cases or for indigents granted leave to appeal in forma pauperis by the trial court.

C. *The issues raised by petitioner did not warrant further briefing and argument.*

1. *The allegation that there was reversible error resulting from the allusions to petitioner's imprisonment was, in the light of the transcript, frivolous.*

a. The transcript shows that the initial reference to the fact that the complaining witness had known petitioner in prison came as a surprise to the government counsel.[18] Before any response could be made

[17] See footnote 14, *supra*, p. 38.

[18] Petitioner contends that government counsel knew that the witness would so testify because the post-arraignment report showing that the witness had known petitioner in the workhouse was "presumably" in counsel's hands or "at least available to him" (R. 20). Aside from this speculation, petitioner does not claim, nor is there any indication, that either govern-

by either petitioner's attorney or the court, counsel for the government moved to strike the answer, saying that he "didn't realize that was the case" (R. 2). The spontaneity of this response by government counsel confirms his claim of surprise, and the witness' response on cross-examination that he had first seen petitioner in Washington, D.C., makes it logical to suppose that this is the answer the prosecutor expected (R. 3–4). Any possible imputation of bad motive on the part of government counsel is negatived by the fact that no further allusions to petitioner's imprisonment were made on direct examination. When defense counsel first asked a question referring to petitioner's imprisonment, government counsel voluntarily informed the court that the prior answer referring to the imprisonment had been stricken from the record (R. 3). The granting of the prompt motion to strike was sufficient to cure any error which might conceivably have resulted from the reference to the Occoquan workhouse. See *United States* v. *Stromberg*, 268 F. 2d 256 (C.A. 2), certiorari denied, 361 U.S. 863; *United States* v. *Curzio*, 179 F. 2d 380 (C.A. 3); *Kinser* v. *United States*, 231 Fed. 856 (C.A. 8).

b. Even if the motion to strike the answer of the complaining witness referring to Occoquan had not been made and granted, petitioner would have had no grounds for reversal of the conviction. It is an elementary legal principle that evidence of prior criminal acts or imprisonment is admissible, in the discretion

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ment counsel or the witness used the report at any time during the trial.

of the trial judge, where such evidence is relevant to show the identity of the defendant as the person who perpetrated the crime charged. See Wigmore, *Evidence* (3d ed. 1940) § 215; McCormick, *Evidence*, (1954) § 157. Here, the only person who could identify petitioner was the complaining witness.

In *Bram* v. *United States*, 226 F. 2d 858 (C.A. 8), the accomplice of a bank robber was permitted to testify that he had first met the defendant in a reformatory in which they were both serving sentences, and a police department description of the defendant was admitted into evidence. The court said, in affirming the conviction (at p. 863):

> But the law is settled beyond discussion that the rule requiring the exclusion of evidence offered to prove that defendant has committed other offenses than the one charged does not apply to evidence which is relevant and competent to prove the charge against the defendant of which he is being tried. * * *
>
> * * * * *
>
> Also, the admittedly accurate description of defendant produced by the police department was clearly relevant to the inquiry as to his identity with the bank robber. That the occasion for making the record was "in connection with an arrest or detention" was also merely incidental.

See, also, *Handy* v. *United States*, 199 F. 2d 704, 706–707 (C.A. 8); *Bracey* v. *United States*, 142 F. 2d 85, 88 (C.A.D.C.), certiorari denied, 322 U.S. 762; *Green* v. *United States*, 176 F. 2d 541 (C.A. 1).

In addition, the reference on direct examination to

petitioner's imprisonment was inferential, rather than direct, since the witness stated only that he had known petitioner at Occoquan. It does not necessarily follow, absent further identification of Occoquan as a prison or the nature of the petitioner's presence there, that the jury would have understood from the name of the place alone that petitioner had been imprisoned for the commission of a crime. It was not shown, on the direct examination, that either the witness or the petitioner had been a prisoner at Occoquan. From that evidence, the jury could have believed (if they knew Occoquan was a prison) that both the witness and petitioner were employees or visitors at the time of their meeting.

All other allusions to the fact that petitioner and the complaining witness had known each other at Occoquan workhouse were made by petitioner's counsel in his behalf, and therefore provide no basis for a claim of error. Defense counsel, in a justifiable effort to impeach the testimony of the complaining witness by testing his familiarity with the petitioner and attacking his credibility by showing that he had a criminal record, adduced again on cross-examination the fact that the witness had known petitioner at Occoquan (R. 3–5). That impeachment was the conscious purpose pursued by trial defense counsel is confirmed by his statement in the closing argument (R. 6):

> These are the facts as we have heard them from the stand from the mouth of the only witness who has identified Benny Lurk. And what kind of witness do we have? *We have a witness who himself is a convicted criminal.* [Emphasis added.]

Petitioner cannot claim error in that which he induces and treats as favorable to himself. See *United States* v. *Apuzzo*, 245 F. 2d 416, 421–422 (C.A. 2), certiorari denied, 355 U.S. 831; see also *Benson* v. *United States*, 146 U.S. 325, 333.

d. Moreover, defense counsel properly expressed himself as satisfied with the judge's instruction that the jury was to consider the testimony as to Occoquan only as it related to the credibility of Edgeworth, the complaining witness. See *supra*, p. 6. It would in any event be too late to assert on appeal that the instruction was inadequate (Rule 30, F.R. Crim. P.; see also, *e.g.*, *Johnson* v. *United States*, 318 U.S. 189, 200–201; *United States* v. *Dornblut*, 261 F. 2d 949, 951 (C.A. 2), certiorari denied, 360 U.S. 912; *McKenna* v. *United States*, 232 F. 2d 431 (C.A. 8)), but we also think it clear that the judge's charge adequately dealt with the situation. It must be presumed that the jury followed the instruction. *Delli Paoli* v. *United States*, 352 U.S. 232.

e. Petitioner argues that he is not bound by the trial tactics of counsel because counsel was appointed and not retained (R. 22). But the fact that counsel was appointed is irrelevant for present purposes. Where, as here, there is no indication of egregious mistake or *mala fides* on the part of trial counsel, the established rules of appellate review must apply to the relationship between counsel and client without regard to whether counsel is appointed or retained. Assigned counsel may properly be held to as strict standards as retained counsel but should not be open to criticism which could not properly be addressed

to the latter. Petitioner has abandoned his claim that he was represented at the trial by incompetent counsel and therefore on appeal can no more challenge the chosen tactics of appointed trial counsel than he could those of retained counsel. See *Kelton* v. *United States*, 170 F. 2d 153 (C.A.D.C.), certiorari denied, 335 U.S. 831.

2. *The court of appeals had no reason to require further argument on the authority of Judge Jackson to act.*

The precise issue raised by petitioner in the court below was whether the Congressional declaration of 1958, in 28 U.S.C. 211 (App. A, *infra*, p. 128), that the Court of Customs and Patent Appeals is a constitutional court gave Judge Jackson, already a retired judge of that court,[19] the status of a retired judge of a constitutional court (R. 26, 27). No point was made as to the status of the Court of Customs and Patent Appeals or of its active judges after the 1958 enactment, or as to the power of Congress to declare the court, in 1958, to be established under Article III of the Constitution. Petitioner limited himself to the narrower claim that, since Judge Jackson had retired before 1958, he could be considered no more than a judge of a legislative court (which petitioner asserts was the court's status before 1958) and therefore unable to sit on the District Court for the District of Columbia, despite the assignment statute.[20] To this contention there are several separate

[19] He had retired in 1952.

[20] In the words of petitioner's memorandum to the court below (R. 26): "The 1958 amendment can neither add to nor de-

answers, some of more restricted scope than others.

a. If, as petitioner assumed below, the Court of Customs and Patent Appeals became an Article III court in 1958 and its active judges became Article III judges, then Judge Jackson, as a retired judge, became an Article III judge at the same time, along with the active judges. In this respect, his status is precisely the same as if he were still active and the same as the judges active in 1958. Judge Jackson is still a judge appointed to the Court of Customs and Patent Appeals; he did not receive a new office when he retired in 1952 and he does not hold one now. As this Court said in *Booth* v. *United States*, 291 U.S. 339, at 350–351:

> By retiring pursuant to the statute a judge does not relinquish his office. The language is that he may retire from regular active service. The purpose is, however, that he shall continue, so far as his age and his health permit, to perform judicial service. * * *. * * * The Act does not and, indeed, could not, endue him with a new office, different from, but embracing the duties of the office of judge. He does not surrender his commission, but continues to act under it * * *.

See also *Donegan* v. *Dyson*, 269 U.S. 49; *Boomhower, Inc.* v. *American Automobile Insurance Co.*, 220 F. 2d 488, 490–491 (C.A.D.C.), certiorari denied, 350 U.S. 833; *United States* v. *Moore*, 101 F. 2d 56, 59 (C.A. 2), certiorari denied, 306 U.S. 664.

b. Moreover, although the argument was not presented to it by the government, the court of appeals

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tract from the status of Judge Jackson as of the time of his retirement on April 1, 1952, or later".

could well have deemed the issue before it precluded by the *de facto* principle, since admittedly Judge Jackson was assigned under the provisions of 28 U.S.C. 294(d) (App. A, *infra*, p. 129). It is well settled in all American jurisdictions in which the question has arisen (including the federal courts) that a judge appointed in due course under a subsisting statute to an existing judicial office is at least a judge *de facto* whose right to sit may not be questioned for the first time on appeal. This Court said, in *McDowell* v. *United States*, 159 U.S. 596, 601–602:

> * * * the rule is well settled that where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public.

See also *Ball* v. *United States*, 140 U.S. 118, 128–129; *Norton* v. *Shelby County*, 118 U.S. 425, 445. See, for further discussion, *infra*, pp. 50–59.

c. Third, regardless of whether the Court of Customs and Patent Appeals, as a court, is or was a legislative or an Article III court, Judge Jackson was competent to sit in petitioner's case because, at least since the 1958 Act, he has been an Article III *judge*. We may assume that defendants in criminal cases in the District Court for the District of Columbia are entitled to be tried before Article III judges. But what this means is that the judge has life tenure, that his pay cannot be reduced, and that he performs judicial functions.[21] A judge with these qualifications is not

[21] Article III, Section 1, of the Constitution provides that "The Judges, both of the supreme and inferior Courts, shall

precluded from sitting in a constitutional court, and does not lose his Article III status, because he may also perform duties in a legislative court. Certainly, this is true of the District of Columbia courts, which may exercise non-Article III functions. *O'Donoghue* v. *United States,* 289 U.S. 516.

Judge Jackson has had a lifetime appointment and his duties are and have been primarily judicial in nature. With respect to his Article III status, the only question, then, is as to the power of Congress to terminate his office or to reduce his compensation. Whatever else it may have done, the 1958 Act on the Court of Customs and Patent Appeals is properly read, at the very least, as a declaration by Congress that it was giving up whatever power it had to end the appointments of the judges of that court or to reduce their salaries—*i.e.,* that if they were not previously judges competent to sit on an Article III court, they have become so as a result of that Act. As with the old Commerce Court (see *infra,* p. 89, fn. 56), the Court of Customs and Patent Appeals may be abolished and its functions distributed elsewhere, but the tenure of the judges will continue unaffected. It follows that, at the time of petitioner's trial, Judge Jackson had all the qualifications required for a judge presiding over an Article III court—regardless of the status of the Court of Customs and Patent Appeals as a court. (For further discussion, see *infra,* pp. 59–64).

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hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

d. Finally, the Court of Customs and Patent Appeals can be deemed an Article III court and its judges Article III judges, both before and after the 1958 Act. See the discussion, *infra*, pp. 64–125. On that view (a position which requires the reconsideration of *Ex parte Bakelite Corporation*, 279 U.S. 438), Judge Jackson was, of course, competent to sit.

On any of these separate grounds, the petitioner's appeal to the court below would fail. The court below could properly deem at least the first three of them to require no further briefing or argument. Particularly in the light of the narrow issue presented by petitioner to that court (*supra*, p. 45) could it decide that it did not need more help to rule that his conviction should not be disturbed.

However, the general question of Judge Jackson's competency to sit on the District Court for the District of Columbia is now before this Court. That issue is present in a number of other cases pending in the courts below, and has a bearing on the competency of the judges of the Court of Claims and of the Customs Court to sit in regular federal courts throughout the country. Petitioner has briefed the question in detail. Accordingly, we shall also do so—in the subsequent portions of this brief—with the thought that the Court may well wish to pass directly upon the problem, so as to settle authoritatively a matter which has now become troublesome and needs resolution.

II

PETITIONER'S CONVICTION SHOULD NOT BE REVERSED BECAUSE JUDGE JACKSON PRESIDED AT HIS TRIAL

We have outlined in Point I (*supra*, pp. 30–49) four reasons why petitioner's conviction should not be reversed because Judge Jackson presided at his trial. In this Point, we discuss three of those reasons more at length:[22] (1) Judge Jackson was at least a *de facto* judge whose authority cannot be challenged on appeal; (2) Judge Jackson is an Article III judge, whatever is or has been the character of the Court of Customs and Patent Appeals; and (3) the Court of Customs and Patent Appeals has always been an Article III court.

A. *Judge Jackson was at least a* de facto *judge of the district court, and petitioner cannot on appeal challenge his authority.*

There can be no question that the *office* which Judge Jackson held during petitioner's trial (and which he is currently holding)—the office of District Judge of the District Court for the District of Columbia—is a lawful or *de jure* one. Admittedly, the assignment of Judge Jackson—a judge with life tenure—is authorized by a law of Congress, 28 U.S.C. 294 (App. A, *infra*, pp. 128–129). Judge Jackson's designation by the Chief Justice of the United States to sit on the District Court was made under and in accordance with that Act of Congress.[23] Judge Jack-

[22] In our view, no further argument is necessary on the first of the four arguments suggested above (*supra*, p. 46) for sustaining petitioner's conviction (with respect to the issue of Judge Jackson's participation).

[23] There is no challenge to the regularity of the designation.

son, in good faith, filled that office and exercised the normal judicial functions incident thereto. Under these circumstances, Judge Jackson was, at the least, a *de facto* judge whose title to office is not subject to challenge by the petitioner on appeal.

1. The rule is settled in the federal courts that where a judge, in good faith and under color of authority, is in actual possession of and discharging the duties of a *de jure* office, a party litigant has no standing to challenge the title of a judge to hold office or the exercise by the judge of judicial authority, whether the judge is regularly or temporarily filling the office. *Ex parte Ward*, 173 U.S. 452, 454; *McDowell* v. *United States*, 159 U.S. 596, 601–602; *Ball* v. *United States*, 140 U.S. 118, 128–129; *Leary* v. *United States*, 268 F. 2d 623, 627 (C.A. 9); *United States* v. *Marachowsky*, 213 F. 2d 235, 245 (C.A. 7), certiorari denied, 348 U.S. 826. See *Johnson* v. *Manhattan Ry. Co.*, 61 F. 2d 934, 938 (C.A. 2).[24]

In *McDowell* v. *United States, supra*, 159 U.S. at 601–602, in answer to the defendant's contention, in a criminal case, that the Circuit Judge lacked the authority to appoint District Judge Seymour from

[24] In *Donegan* v. *Dyson*, 269 U.S. 49, the Chief Justice of the United States, pursuant to statute, designated Judge Mack, formerly of the Commerce Court, to sit in the District Court for the Southern District of Florida. The petitioner, in that case, was subsequently convicted on a criminal charge in the district court, the trial of which was presided over by Judge Mack. This Court, in sustaining the authority of Judge Mack, held that his designation was proper under the statute, and that, therefore, it was unnecessary to consider whether he was a *de facto* judge. *Id.* at 54.

another district to fill a vacancy in the district of trial, this Court ruled:

> Whatever doubt there may be as to the power of designation attaching in this particular emergency, the fact is that Judge Seymour was acting by virtue of an appointment, regular on its face; and the rule is well settled that where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public.

In *Ex parte Ward, supra,* 173 U.S. 452, a convicted defendant challenged by habeas corpus the jurisdiction of the presiding judge to discharge judicial functions since he had not been at the time confirmed by the Senate. While the holding of the Court was that the question could not be raised on habeas corpus, the Court's reference to its prior *McDowell* decision indicates that it deemed the *de facto* doctrine applicable even if raised on direct attack. See *Ball* v. *United States,* 140 U.S. at 128–129.

The *de facto* doctrine is grounded upon principles of public policy to avoid the confusion, uncertainty, and delay which would result from challenges to the authority of public officers.[25] As this Court put it in *Norton* v. *Shelby County, supra,* 118 U.S. at 441–442:

> The doctrine which gives validity to acts of officers *de facto* * * * is founded upon considerations of policy and necessity, for the protection of the public and individuals whose inter-

[25] See also *Commonwealth* v. *Di Stasio,* 297 Mass. 347, 351, certiorari denied, 302 U.S. 683; *Sylvia Lake Co.* v. *Northern Ore Co.,* 242 N.Y. 144, 147–148, certiorari denied, 273 U.S. 695.

ests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. It is manifest that endless confusion would result if in every proceeding before such officers their title could be called in question.

2. The principle that the authority of a judge acting in good faith under color of authority as a "regular" or "permanent" judge is not open to challenge is recognized by all American jurisdictions.[28]

[28] *E.g.*, *Spradling Thomas* v. *State*, 17 Ala. 440, 446; *Humel* v. *Hoogendorn*, 5 Alaska 25, 27; *Logan* v. *Harris*, 213 Ark. 37, 39–40; *People* v. *Sassovich*, 29 Cal. 480, 485; *Gorman* v. *People*, 17 Colo. 596, 597 (dicta); *State* v. *Carroll*, 38 Conn. 449, 464–472; *Territory* v. *Mattoon*, 21 Haw. 672, 674–675; *State* v. *Malcom*, 39 Ida. 185, 193 (dicta); *People ex rel. Ballou* v. *Bangs*, 24 Ill. 184, 186–187 (dicta); *Rogers* v. *Beauchamp*, 102 Ind. 33, 36–37; *State* v. *Miller*, 71 Kan. 491, 492; *Orme* v. *Commonwealth*, 21 Ky. L. Rep. 1412, 1413–1414; *State* v. *Sadler*, 51 La. Ann. Rep. 1397, 1401–1410; *Brown* v. *Lunt*, 37 Me. 423, 428–433; *Commonwealth* v. *DiStasio*, 297 Mass. 347, 350–352, certiorari denied, 302 U.S. 683; *People* v. *Townsend*, 214 Mich. 267, 270–271; *State* v. *Brown*, 12 Minn. 538; *Pringle* v. *State*, 108 Miss. 802, 809; *State* v. *Rich*, 20 Mo. 393, 396–397 (dicta); *Tucker* v. *Myers' Estate*, 151 Neb. 359, 367; *Walcott* v. *Wells*, 21 Nev. 47, 54–56; *Byer* v. *Harris*, 77 N.J.L. 304, 309; *State* v. *Blancett*, 24 N. Mex. 433, 448–449, writ of error dismissed, 252 U.S. 574; *Sylvia Lake Co.* v. *Northern Ore Co.*, 242 N.Y. 144, 147–148, certiorari denied, 273 U.S. 695; *State* v. *Harden*, 177 N.C. 580, 583–584; *Youmans* v. *Hanna*, 35 N.D. 479, 518–523; *Stiess* v. *State*, 103 Ohio St. 33, 41–43; *Morgan* v. *State*, 66 Okla.

The *de facto* doctrine has been applied to deny standing to private litigants who have challenged the very right of the incumbent to hold judicial office. *E.g., Pringle* v. *State*, 108 Miss. 802, 808–809 (where the judge was appointed by the governor, while the state constitution required that judges be elected by the populace); *Orme* v. *Commonwealth*, 21 Ky. L. Rep. 1412, 1413–1414 (where an individual was elected as judge, but there was no ordinance providing for the calling of the election, as state law required); *Snow* v. *State*, 134 Tex. Crim. App. 263, 265–267 (where the challenged party, during the same term of the legislature for which he was elected, was selected as a judge, the state constitution expressly denying the eligibility of a legislator to hold office as a judge during the same term of the legislature which raised the emoluments of the particular judicial office). See also *Commonwealth* v. *Di Stasio*, 297 Mass.

Crim. Rep. 205, 210–211; *State ex rel. Madden* v. *Crawford*, 207 Ore. 76, 90; *Clark* v. *The Commonwealth*, 29 Pa. St. 129, 138; *Cromer* v. *Boinest*, 27 S.C. 436, 441–444; *State* v. *Ness*, 75 S.D. 373, 376–377; *Ridout* v. *State*, 161 Tenn. 248, 268; *Snow* v. *State*, 134 Tex. Crim. Rep. 263, 266–268; *McGregor* v. *Balch*, 14 Vt. 428, 436–437; *McCraw* v. *Williams*, 74 Va. 510, 512–514; *State* v. *Britton*, 27 Wash. 2d 336, 344–346; *State* v. *Carter*, 49 W. Va. 709, 711–712; *Baker* v. *State*, 80 Wis. 416, 419. Cf. *Jeffords* v. *Hine*, 2 Ariz. 162, 168–169; *State ex rel. James* v. *Deakyne*, 41 Del. 217, 222–223; *Florida ex rel. Attorney General* v. *Gleason*, 12 Fla. 190, 229–234, writ of error dismissed *sub. nom. Gleason* v. *Florida*, 9 Wall. 779; *Crawford* v. *Howard*, 9 Ga. 314, 316–317; *Ex parte Strahl*, 16 Ia. 369, 370–371; *Buckler* v. *Bowen*, 198 Md. 357, 365–367; *Marcellus* v. *Wright*, 61 Mont. 274, 289–290; *Attorney General* v. *Megin*, 63 N.H. 378, 379; *State* v. *Lane*, 16 R.I. 620, 626; *May* v. *City of Laramie*, 58 Wyo. 240, 276. See *Wenner* v. *Smith*, 4 Utah 238, 245.

347, certiorari denied, 302 U.S. 683; *State* v. *Blancett*, 24 N. Mex. 433, 446–447.

There is, however, conflict in the states as to whether the title of a "special" or "temporary" judge may be questioned by party litigants. Some courts, following the general rule as to regular or permanent judges, will not permit such attack. *E.g.*, *Bird* v. *State*, 154 Miss. 493, 499–500; *State* v. *Miller*, 111 Mo. 542, 549; *Barden* v. *State*, 98 Neb. 180, 182; *State* v. *Harden*, 177 N.C. 580, 583–584; *Garza* v. *State*, 120 Tex. Crim. Rep. 147, 148. Other courts, on the theory that such a judge possesses the right to hold office only through some special type of selection, permit such challenges if made in a timely fashion in the court where the temporary or special judge sits. *E.g.*, *Lillie* v. *Trentman*, 130 Ind. 16, 20–21; *Schlungger* v. *State*, 113 Ind. 295, 296; *Salyer* v. *Napier*, 21 Ky. L. Rep. 172, 173; *Lacy* v. *Barrett*, 75 Mo. 469, 472–473; *State* v. *Holmes*, 12 Wash. 169, 179–180.

However, it is the unanimous rule in all American jurisdictions (which have passed on the problem) that the question may not be raised for the first time on appeal. See, *e.g.*, *Lamar* v. *United States*, 241 U.S. 103; *Moreno Rios* v. *United States*, 256 F. 2d 68 (C.A. 1); *United States* v. *Marachowsky*, 213 F. 2d 235 (C.A. 7) certiorari denied, 348 U.S. 826; *Greenwood* v. *State*, 116 Ind. 485; *State* v. *Schuermann*, 146 La. 110; *Bird* v. *State*, 154 Miss. 493; *Rives* v. *Pettit*, 4 Ark. 582. As the Supreme Court of Indiana stated in refusing to entertain the appellant's collateral attack upon a special judge who presided over the cause (*Lillie* v. *Trentman*, *supra*, 130 Ind. at 21):

> A practice that would permit a party litigant to proceed for months before a *de facto* judge, to make issues, and obtain rulings upon legal questions involved in the controversy, and then, if not satisfied with some of his rulings; or not disposed to go into trial, when the cause is ready for trial, to be able, in a moment, to arrest proceedings, and oust the jurisdiction of the judge, can not be tolerated.

Since the petitioner did not challenge the authority of Judge Jackson to sit until the appellate stage, even those rulings sanctioning a challenge where the objection to the judge's authority is timely lodged in the court where the judge sits are of no avail to this petitioner.

3. The title to office or the exercise of judicial authority of a *de facto* judge may normally be challenged only in a direct proceeding—usually in the nature of a *quo warranto* action—instituted by the sovereignty in whose name the judge is exercising judicial authority.[27] See 1 Freeman, *Judgments* (5th ed., 1925), Sec. 327, and cases cited; Church, *Habeas Corpus* (2d ed., 1893), Secs. 256, 257, and cases cited. Cf. *Ball* v.

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[27] *Spradling & Thomas* v. *State*, 17 Ala. 440, 446; *Jeffords* v. Hine, 2 Ariz. 162, 168–169; *State of Florida* v. *Gleason*, 12 Fla. 190; *People ex rel. Ballou* v. *Bangs*, 24 Ill. 184, 186–187; *Ex parte Strahl*, 16 Ia. 369, 371; *State* v. *Williams*, 61 Kan. 739, 741; *State* v. *Sadler*, 51 La. Ann. Rep. 1397, 1402; *Answer of the Justices*, 122 Mass. 600, 603, 604; *State* v. *Rich*, 20 Mo. 393, 396–397; *Walcott* v. *Wells*, 21 Nev. 47, 54–55; *State ex rel. Bockmeier* v. *Ely*, 16 N.D. 569; *Sylvia Lake Co.* v. *Northern Ore Co.*, 242 N.Y. 144, 147, certiorari denied, 273 U.S. 695; *Stiess* v. *State*, 103 Ohio St. 33, 41; *Morgan* v. *State*, 66 Okla. Crim. Rep. 205, 210–211; *Ridout* v. *State*, 161 Tenn. 248, 259–260; *Snow* v. *State*, 134 Tex. Crim. Rep. 263, 266–268; *McGregor* v. *Balch*, 14 Vt. 428, 437.

United States, supra, 140 U.S. at 128–129; *Ex parte Ward, supra,* 173 U.S. at 456. In such a proceeding, the judge is formally made aware of the challenge to his title and is afforded an opportunity to defend his position. In the District of Columbia, that would be done under 16 D.C. Code 1601–1608 which provides that the Attorney General of the United States or the United States Attorney for the District of Columbia may institute, either on their own motion or on the relation of a third party, a proceeding in *quo warranto* to try the title to hold office; or, should the Attorney General or United States Attorney refuse or fail to act in the matter, a third party may institute similar proceedings by filing a verified petition in the District Court for the District of Columbia."

4. Our position in this case—that Judge Jackson was at least a *de facto* judge whose title to office and whose exercise of judicial authority are not open to attack in this proceeding—is not inconsistent with the decision of this Court and the position taken by the government in *United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685. In that case, a retired judge of the Court of Appeals for the Second Circuit sat during an *en banc* rehearing and cast the decisive vote, although 28 U.S.C. 46(c) expressly limited *en banc* proceedings to the "active circuit judges of the circuit." The government contended that the retired judge could not be deemed a *de facto* judge because a specific legislative mandate precluded him from participating in the *en banc* proceedings. See Brief for the United States in *United States* v. *American-Foreign Steamship Corp.*, No. 138, O.T.

1959, pp. 24–28. In other words, 28 U.S.C. 46(c), eliminating retired circuit judges from *en banc* proceedings in the courts of appeals, also eliminated the *office* of retired judges in those matters. And, since there cannot be a *de facto* judge unless there is first a *de jure* office to fill (*Norton* v. *Shelby County*, *supra*, 118 U.S. at 443–444, 449; see *In re Manning*, 139 U.S. 504, 506–507), the retired judge in the *American-Foreign* case could not have been a *de facto* officer; there was no *office* for him to fill.[28] In the instant case, it is undisputed that Judge Jackson occupied a *de jure* office—District Judge on the District Court for the District of Columbia—and since he filled that office in good faith and under color of authority, he was at least a *de facto* occupant of that *de jure* office.

Similarly, *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132, a case on which the petitioner in large part relies, turned on the *de jure* composition of the court itself. There, a three-judge district court was convened according to law and heard the case. When one of the judges subsequently became ill, the remaining two judges determined the matter without the assistance of the third judge. This Court, in holding the action taken by the two judges to be void, pointed out that the statute specifically intended that such cases be determined by a district court of three judges. The Court said that the requirement of a three-judge district court "is not a broad social measure to be construed with liberality. It is a tech-

[28] In addition, in the *American-Foreign* case, the United States contested the right of the retired circuit judge to sit on the *en banc* court as soon as it was apprised that he had done so. See 363 U.S. at 687.

nical rule of procedure to be applied as such." *Id.* at 136. The statute in *Ayrshire*, unlike the situation at bar, took away the *offices* of two of the judges of the three-judge district court during the absence of the third judge—*i.e.*, the *office* of judge on a three-judge district court exists in legal contemplation only when three such judges, no more and no less, are sitting as such. That is not the case here, for the office of District Judge of the District Court for the District of Columbia exists irrespective of the mode or the manner in which Judge Jackson was selected to fill that office or of Judge Jackson's qualifications to do so.[29]

B. *Judge Jackson is and has been an Article III judge, at least since 1958, and is fully competent to sit on the District Court for the District of Columbia.*

We have also suggested (*supra*, pp. 47–48) that—regardless of the status of the Court of Customs and Patent Appeals, as a court, in 1952, 1958, or today [30]—

[29] *Ford v. Kelly*, 302 U.S. 312, posed a different problem. There, a judge sitting by designation in the Southern District of New York concluded a criminal case. Subsequently, while acting in his regular capacity as a judge of the Eastern District, he, with the consent of parties, entertained a petition in the case for discharge from probation and termination of proceedings under the provisions of the Probation Act. This Court held that this petition was a new matter which could be determined only by the court of the district of trial. Since the judge did not even purport to act as a judge of the Southern District (the district of trial), when he ruled on the discharge from probation, the *de facto* doctrine was not really involved.

[30] It would be possible for a court to be considered a legislative court even though its judges (or some of them) are Article III judges, if the touchstone for testing the status of a federal court (as this Court has stated it) remains the power actually exercised by Congress in creating the tribunal. See

Judge Jackson is and has been (at least since 1958) an Article III judge fully competent to sit on the District Court for the District of Columbia.

1. Judge Jackson has all the qualifications of an Article III judge. He has life tenure and performs judicial duties. The provision in the 1958 Act (part of 28 U.S.C. 211, App. A, *infra*, p. 128) that the Court of Customs and Patent Appeals "is hereby declared to be a court established under article III of the Constitution of the United States" means, at the very least, that Congress has irrevocably given up whatever power it may have had to reduce the compensation or terminate the appointment of the judges of that court (including its retired judges). If they were not such before, since the 1958 statute those judges have been Article III judges in the same category as the judges appointed to the various district courts and courts of appeals.

2. No difficulty is raised by the fact that Judge Jackson may also be called to sit in a legislative court (if the Court of Customs and Patent Appeals be deemed such). On that tribunal, his duties would be primarily judicial (on any view of the court's patent and trade-mark jurisdiction) and the issues with which he would be concerned would arise under the Constitution and laws of the United States. It is settled, we believe, that Article III judges may con-

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Ex parte Bakelite Corporation, 279 U.S. 438, 459-460; *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 640-644 (opinion of Vinson, C. J.). Under that test, if the power exercised lies outside of Article III, the court is a legislative one.

stitutionally exercise judicial power not stemming from Article III, at least so long as it is of the same kind as the powers specified in that Article. See *United States* v. *Duell*, 172 U.S. 576, 589. This Court and the courts of appeals have heard cases from Alaska, Hawaii, Puerto Rico, the Virgin Islands, and the Philippines, as well as from other former territories—in cases in which judicial power has been exercised under provisions of the Constitution other than Article III. To the extent that the Customs Court, the Court of Customs and Patent Appeals, and the Court of Claims have been considered legislative tribunals (*Ex parte Bakelite Corporation*, 279 U.S. 438; *Williams* v. *United States*, 289 U.S. 553), the Justices of this Court have been deciding, on review, issues from courts thought to be established under Article I rather than Article III. See *Pope* v. *United States*, 323 U.S. 1, 13–14. Similarly, there would be no reason why a circuit judge or a district judge from a district within a state could not sit, by assignment, on the District Court for Puerto Rico, for the Virgin Islands, or for Hawaii (before it became a state); and regardless of whether the Court of Claims, the Customs Court, and the Court of Customs and Patent Appeals are constitutional courts, there appears to be no valid constitutional reason why circuit and district judges would be incompetent to sit on those tribunals.

Moreover, history and practice show that there is no rigid rule precluding Article III judges from exercising any non-judicial function. Constitutional judges have not infrequently accepted and performed non-judicial governmental assignments of

various kinds, while retaining their judicial offices. See Hart and Wechsler, *The Federal Courts and the Federal System* (1953), pp. 102–105. Perhaps the most important instance was the participation by five Justices in the Presidential Election Commission of 1877, pursuant to the Act of January 29, 1877, 19 Stat. 227, 228 (see Morison and Commager, *The Growth of the American Republic* (Vol. 2, 4th ed. 1956), pp. 77–78). At the present time constitutional judges regularly sit on official judicial conferences which recommend legislation to Congress and take other steps not strictly within the judicial power granted by Article III. Judges of some lower courts appear to have given opinions to legislative bodies, in the role of commissioners and not strictly as Article III judges (see footnote 85, *infra*, p. 125). See also the extradition statutes, 18 U.S.C. 3184, 3186.

The general principle thus illustrated is, we believe, that Article III *judges* (as distinguished, perhaps, from Article III *courts*) may validly perform certain non-Article III or non-judicial functions while retaining their positions as constitutional judges. The extent to which this can be done is still unclear, but we submit that non-judicial or non-Article III duties which are closely related or comparable to judicial functions under Article III are most probably within the allowable area. To the extent that the judges of the Court of Customs and Patent Appeals may exercise such non-judicial and non-Article III powers in the fields of tariff law, patents, and trade-marks (see *infra*, pp. 116–121), their duties are both closely related and comparable

to the "judicial power" which is the subject of Article III. See the discussion, *infra*, pp. 121–126.

In any event, a claim that Article III and non-Article III functions cannot be mixed is wholly incorrect for the District of Columbia District Court on which Judge Jackson has been sitting. If one thing is clear in this field of the law, it is that the judges of the superior District of Columbia courts may exercise both judicial and non-judicial functions, as well as both Article III functions and non-Article III functions. *O'Donoghue* v. *United States*, 289 U.S. 516, 545–548; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693; *Keller* v. *Potomac Electric Co.*, 261 U.S. 428. See *infra*, pp. 121–125.

3. Nor can it be said that the 1958 Act, in renouncing Congressional power to terminate the tenure or reduce the compensation of the judges of the Court of Customs and Patent Appeals, so changed the character of the office as to require a new Presidential appointment. These judges already had life tenure, on appointment of the President, and their salaries were fixed by law. Congress merely gave up its potential authority to shorten their terms or to lower their compensation. Though this change sufficed to make the members of the court Article III judges,[31] it did not interfere with the President's appointment power, any more than would a statutory increase in salary or emoluments. Congress has often made far more drastic alterations in the tenure or compensation of existing officials without encroaching upon the Presidential power of appointment—changes in salary, re-

[31] We are assuming, *arguendo*, in this section of our brief, that the judges were not constitutional judges before 1958.

tirement benefits, other emoluments, duties, and even terms of office. In the absence of a clear Congressional purpose to abolish the old office and create a new one, a change of the type involved here does not constitutionally require a new appointment and new confirmation.

4. Under our view, the judges of the Court of Customs and Patent Appeals would remain Article III judges even if Congress abolished the court and ended or transferred its functions. When the Commerce Court was abolished in 1913, its judges continued as circuit judges assigned to Article III courts. On the Commerce Court, see footnote 56, *infra*, p. 89, Frankfurter and Landis, *The Business of the Supreme Court* (1928), pp. 153-174, 234; *Dorregan* v. *Dyson*, 269 U.S. 49.

C. *The Court of Customs and Patent Appeals was created by Congress as, and has always been, an Article III court.*

It is also the government's position that the Court of Customs and Patent Appeals, as a court, was created, and has always been, an Article III court.[32] The

[32] The classification of courts of the United States into two categories—"constitutional" courts, consisting of this Court and those "inferior Courts" which Article III, Section 1, of the Constitution authorizes Congress from time to time to ordain and establish, and in which is vested the "judicial Power of the United States", and "legislative" courts, consisting of courts created by Congress pursuant to powers conferred by other articles of the Constitution—had its origin in *American Insurance Co.* v. *Canter*, 1 Pet. 511, 546 (1828), involving the status and character of territorial courts. The genesis and development of the distinction are discussed in 1 Moore, *Federal Practice* (2d ed., 1960), § 0.4, pp. 53-73; Katz, *Federal Legislative Courts*, 43 Harv. L. Rev. 894 (1930); Watson, *The Concept of the Legislative Court: A Constitutional Fiction*, 10 Geo. Wash.

language and history of the statute creating the court and its subsequent history are persuasive that this is so. And in the 1958 Act Congress meant, we believe, simply to declare what powers it had exercised when it established the Court, not to turn a previously legislative tribunal into a constitutional court.[33]

Indeed, the very purpose of the 1958 statute was to negate, so far as possible, this Court's holding in *Ex parte Bakelite Corporation*, 279 U.S. 438 (1929), that the Court of Customs Appeals was a legislative court because Congress had created it under the tariff power conferred by Article I. That decision had been rendered without the benefit of an explicit and authoritative declaration by the body which created the court as to which of its constitutional powers was exercised

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L. Rev. 799 (1942); Note, *The Restrictive Effect of Article Three on the Organization of Federal Courts*, 34 Col. L. Rev. 344 (1934); Note, *The Judicial Power of Federal Tribunals Not Organized Under Article Three*, 34 Col. L. Rev. 746 (1934); Comment, *The Distinction Between Legislative and Constitutional Courts*, 43 Yale L. Journ. 316 (1933); see also *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582. The terminology is somewhat misleading; as has been pointed out (see, *e.g.*, 1 Moore *op. cit.*, §0.4[1], pp. 53–54), all federal courts might be characterized as constitutional courts since they are established either by the Constitution itself or by Congress acting under some constitutional grant of power. Constitutional courts are sometimes referred to, more accurately, as "courts established under Article III of the Constitution", or "Article III" courts. We shall usually use the latter term in this brief.

[33] Our brief in opposition to certiorari (No. 480 Misc., this Term) was based on the assumption that the 1958 amendment changed the character of the court from a legislative to a constitutional court (see pp. 7–8). However, our further study of the Act and its legislative history (see *infra*, pp. 66–74) convinces us that its purpose was to clarify, not alter, the court's status.

in bringing the court into being. Had such a declaration been before the Court when it decided the *Bakelite* case, it would, we submit, have reached the contrary result. And this, we think, was the reasoning of Congress in enacting the 1958 Act. It also seems doubtful whether the Court fully took account of the pertinent historical considerations to which we shall refer (*infra*, pp. 75–97). We discuss the *Bakelite* opinion in detail, *infra*, pp. 97–108).[34]

1. *Congress, by the Act of August 25, 1958, declared the Court of Customs and Patent Appeals to be a court which had been established under Article III of the Constitution.*

The Act of August 25, 1958, § 1, 72 Stat. 848, amended Section 211 of Title 28 of the United States

[34] It is pertinent to note that this Court, in holding that the superior courts of the District of Columbia were established under Article III (*O'Donoghue* v. *United States*, 289 U.S. 516 (1933)), found it necessary to repudiate its *dicta* to the contrary in the *Bakelite* case (279 U.S. at 450, 460), decided four years earlier. It did so, moreover, without the benefit of a congressional statement so declaring, such as now exists with respect to the Court of Customs and Patent Appeals.

In other *dicta* in the *Bakelite* case (279 U.S. at 452–455), the Court expressed the view that the Court of Claims was a legislative court, and in *Williams* v. *United States*, 289 U.S. 553 (1933), the Court, approving these *dicta*, so held. In *Pope* v. *United States*, 323 U.S. 1, the government (reversing its position in the *Williams* case) argued, on the basis of its study of the history of the Court of Claims and the decisions of this Court prior to the *Williams* case, that *Williams* had been wrongly decided and should be overruled. See Brief for the United States, No. 26, Oct. Term, 1944, pp. 60–109. The Court, however, found it unnecessary to reach the question. 323 U.S. at 13. Subsequently, in 1953 (see *infra*, pp. 67–71), Congress passed an Act, similar to the 1958 Act, declaring the Court of Claims to be established under Article III. See also *infra*, pp. 110–114.

Code (the Code provision codifying the statute which created the Court of Customs and Patent Appeals) by adding, after the words

> The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record known as the United States Court of Customs and Patent Appeals

a new sentence, reading:

> Such court is hereby declared to be a court established under article III of the Constitution of the United States.

(*a*). The language of the amendment shows that its purpose was, not to *make* the Court of Customs and Patent Appeals an Article III court, but to declare that it *was* such a court. The purpose was not to change the character of the court from a legislative court to one established under Article III, but to declare that it had been from its creation such a court. Congress, in short, formally and authoritatively declared, through an amendment of the organic act creating the court, that in bringing the court into being it had exercised its power under Article III to create inferior federal courts.

(*b*). The legislative history of the measure confirms this purpose.

In 1953 and 1956, Congress enacted with respect to the Court of Claims and the Customs Court the identical legislation which it enacted in 1958 for the Court of Customs and Patent Appeals. Act of July 28, 1953, c. 253, § 1, 67 Stat. 226; Act of July 14, 1956, c. 589, § 1, 70 Stat. 532. The 1953 Act added to Section 171

of Title 28 (establishing the Court of Claims) the identical sentence—"Such court is hereby declared to be a court established under article III of the Constitution of the United States"—which the 1958 Act added to Section 211, and the 1956 Act added the same language to Section 251 (providing for the Customs Court). All three statutes must be read *in pari materia*.

The bill which became the 1953 Act was H.R. 1070, 83d Congress. The House Judiciary Committee, in reporting it out, made clear that its purpose was declaratory. H. Rept. 695, 83d Cong., 1st sess., said (p. 2):

> The principal purpose of this bill is to declare the United States Court of Claims to be a court established under article III of the Constitution. Subsequent to a long line of decisions which recognized the Court of Claims as such a constitutional court, the United States Supreme Court held in 1933 that the Court of Claims was not organized under the provisions of article III, but rather was created by Congress as a so-called legislative court in the exercise of its constitutional power under article I to pay the debts of the United States. By Congress declaring unequivocally—as this bill proposes—that the Court of Claims was in fact established as, and continues to be, a constitutional court, this measure not only will protect the independence of the bench of the Court of Claims, but also will remove any doubt as to the power of Congress to authorize the Chief Justice of the United States to assign district and circuit judges to assist the judges of the

Court of Claims whenever such action is considered necessary or expedient. * * * [35]

A companion Senate bill, S. 1349, differed from the House bill in that, instead of adding the statement "Such court is hereby declared to be a court established under article III of the Constitution, of the

[35] In the same vein, the report went on to say (pp. 3–5):

The first section of the bill declares the Court of Claims to be a court established under article III of the Constitution, i.e., a "constitutional court." Need for this declaration arises from the decision of the Supreme Court in 1933 in the case of *Williams* v. *United States* (289 U.S. 553), which held that the Court of Claims was not one of the inferior courts established by Congress under article III of the Constitution, but rather was created by Congress as a "legislative court" in the exercise of congressional powers under article I, to pay the debts of the United States. Section 1 of the bill should remove any doubt that the Court of Claims is a constitutional court.

* * * * *

It seems certain that Congress, when it established the Court of Claims in 1954 [*sic;* should read "1855"], intended to create a court under article III. [A discussion of the legislative history of the 1855 Act and the judicial precedents relating to the Court of Claims prior to the *Williams* decision follows.]

* * * * *

In the Williams litigation the Department of Justice took the position that the Court of Claims was not an article III court. But years subsequent to that decision and after restudy of the question, the Department of Justice filed an extensive brief in *Pope* v. *United States* (323 U.S. 1 (1944)), taking the position that the *Williams* case was wrong.

In view of this uncertainty and difference of opinion it would certainly seem proper for the body which created the Court of Claims to declare whether, in the creation of it, Congress intended to exercise article I or article III power.

United States" to Section 171 of Title 28 as a separate sentence, it proposed to amend the section so as to make it read, in a single sentence:

> The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record *established under article III of the Constitution of the United States and* known as the United States Court of Claims.[36]

When the bill came up for debate, Senator Gore requested that the House bill, H.R. 1070, be substituted for it. 99 Cong. Rec. 8943–8944. He explained that he objected to the Senate bill because of "the manner in which it undertook to change the status of the Claims Court from a legislative court to a constitutional court." *Id.*, p. 8943. "The language of the first section of that [Senate] bill," he said, "is such that I believe the President could have assumed that Congress intended that he should reappoint the present judges, or appoint new judges, to what I think he could have properly regarded as a new court." *Ibid.* After pointing out that "This deficiency, namely, this change in the character of the court, could produce many serious consequences," the Senator stated (*ibid.*):

> The language of H.R. 1070, I believe, successfully avoids these unhappy possibilities. By simply declaring that the existing Court of Claims should be a court established under article III of the Constitution, this bill makes

[36] See S. Rept. 261, 83d Cong., 1st sess., p. 3, on S. 1349. The italicized words were proposed to be added to the section by the Senate bill.

> it clear that the Congress does not intend to create a new court. In any event, I think it is desirable that the legislative history show with utmost clarity that in passing this bill Congress is not establishing a new Court of Claims.

Senator McCarran, the sponsor of the Senate bill, while disagreeing with Senator Gore as to the bill's effect, interposed no objection to the substitution of the House bill, which was thereupon voted on and passed. *Id.*, p. 8944.[37]

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[37] The Senate committee report which originally accompanied S. 1349 (S. Rept. 261, 83d Cong., 1st sess.) stated in part (p. 2):

> The United States Court of Claims, as it now exists, is a legislative court. This was decided in the case of *Williams* v. *United States* (289 U.S. 553). * * *
>
> The fact that the Court of Claims is not a "constitutional court" raises many complications. * * * There appears to be no doubt but that the Court of Claims could, therefore, have been created under said article III. The committee is of the opinion that it more properly should have been so created, and this bill accomplishes this end. * * *

A "corrected report" (S. Rept. 275, 83d Cong., 1st sess.) was substituted for this report. 99 Cong. Rec. 5020. The corrected report substituted for the last sentence of the above-quoted excerpt the following (p. 2):

> The committee is of the opinion that Congress intended it to have been so created, and this bill accomplishes this end.

It seems probable that this change between the original and the corrected report is indicative of the declaratory intent of the 1953 Act. On the other hand, in later reports—S. Rept. 2352, 83d Cong., 2d sess., p. 2, on S. 2975 (a bill introduced in the 83d Congress to declare the Customs Court to be an Article III court, but which was passed over), S. Rept. 2353, 83d Cong., 2d sess., p. 2, on S. 3131 (a bill introduced in the 83d

The 1956 Act, as we have said, added to Section 251 of Title 28 (relating to the Customs Court) the same sentence which the 1953 Act added to Section 171 (for the Court of Claims). The bill which became the 1956 Act, S. 584, 84th Congress, passed both Houses without debate. 102 Cong. Rec. 7264, 11589. The House committee report on the bill referred to the fact that "[s]imilar legislation" had been enacted in the previous Congress with respect to the Court of Claims, and described the purpose of the bill as "to remove all doubt as to the status of the Customs Court as a court established under article III" and "declare which of the powers Congress was intending to exercise when the court was created." H. Rept. 2348, 84th Cong., 2d sess., p. 2. The Senate committee report likewise described the purpose of the bill as "to declare the Customs Court to be a constitutional court" (S. Rept. 1827, 84th Cong., 2d sess., p. 1).[38]

Congress to declare the Court of Customs and Patent Appeals to be an Article III court, but which was passed over), and S. Rept. 1827, 84th Cong., 2d sess., p. 2, on S. 584 (the bill which became the 1956 Act declaring the Customs Court to be an Article III court)—the language of the last sentence of the quoted passage from the original report, S. Rept. 261, 83d Cong., 1st sess., *supra*, continued to be used. It is evident that the statement "The United States Court of Claims, as it now exists, is a legislative court", in context, meant only that it had been so held by this Court in the *Williams* case. See, also, fn. 38, *infra*, pp. 72–73. The failure to conform the language of the later reports to the "corrected" language of S. Rept. 275, 83d Cong., 1st sess., *supra*, must be attributed to oversight.

[38] The Senate report also stated, in explaining the purpose of the bill, that "The Customs Court, as it now exists, is a legislative court" (p. 2). A similar statement, made with re-

The immediate legislative history of the 1958 Act further confirms Congress' purpose in amending the Code section establishing the Court of Customs and Patent Appeals. The bill was H.R. 7866, 85th Congress. Both the House and the Senate committee reports referred to the prior actions of Congress in making similar declarations for the Court of Claims and the Customs Court, and stated that (as in the case of the prior Acts) the object of the bill was to remove all doubt as to the status of the Court of Customs and Patent Appeals as a court created pursuant to, and deriving its powers from, Article III of the Constitution. H. Rept. 2349, 85th Cong., 2d sess., pp. 2–3; S. Rept. 2309, 85th Cong., 2d sess., pp. 2–3. The explanations by the sponsors of the bill on the floor of the House immediately prior to passage were to the same effect. 104 Cong. Rec. 16094–16095. Repre-

spect to the Court of Claims, appeared in both the original and the corrected Senate committee report accompanying S. 1349, 83d Congress. See fn. 37, *supra*, pp. 71–73. And a like statement, pertaining to the Court of Customs and Patent Appeals, appeared in S. Rept. 2353, 83d Cong., 2d sess., p. 1, on S. 3131 (an earlier bill which would have declared the Court of Customs and Patent Appeals to be an Article III court). The contexts in which these statements were made reveal that the committee meant that these courts had been held to be, or were generally considered as, legislative courts. Thus, in S. Rept. 261, 83d Cong., 1st sess. (quoted in part in fn. 37, *supra*, pp. 71–72), immediately following the statement ("The United States Court of Claims, as it now exists, is a legislative court"), the committee explained: "This was decided in the case of *Williams* v. *United States* (289 U.S. 553)." And, of course, in *Ex parte Bakelite Corporation*, 279 U.S. 438, 457–461, this Court held the Court of Customs and Patent Appeals to be a legislative court, and indicated that the Customs Court was likewise such a court.

sentative Keating stated that the bill would "complete * * * the action which Congress initiated in declaring the Customs Court to be a constitutional court" and "remove all doubt as to the status of the Court of Customs and Patent Appeals" by "expressly declar[ing] that court to be 'a court established under Article III of the Constitution of the United States' ". 104 Cong. Rec. 16095. Representative Celler explained that the bill would make "no change in the structure, organization, or jurisdiction of the court." *Ibid.* Similarly, on the Senate floor, Senator Talmadge, on behalf of the Chairman of the Judiciary Committee, explained that the "precedent for this proposed legislation" was "a similar provision relating to the customs court" enacted by the previous Congress. 104 Cong. Rec. 17549.[39]

[39] It is true that Senator Talmadge referred to the Customs Court as having been "made a constitutional court" by the 1956 Act, and he referred to "the change of the Court of Customs and Patent Appeals from a legislative court to a constitutional court" which the pending bill would bring about. 104 Cong. Rec. 17549. But since the 1956 Act was, as we have seen, intended merely to declare the Customs Court to be a constitutional court, and since Senator Talmadge explained that the bill under discussion would merely accomplish with respect to the Court of Customs and Patent Appeals what the 1956 Act had accomplished with respect to the Customs Court, the Senator's reference to the bill as one which would "change" the Court of Customs and Patent Appeals from a legislative court to a constitutional one was merely an imprecise use of language. Compare the remark of Representative Keating, in the same statement in which he said that the bill before the House would merely "remove all doubt as to the status of the Court of Customs and Patent Appeals" (see the text, *supra*), that the court "should be established as" an Article III court. 104 Cong. Rec. 16095.

2. *The Court of Customs and Patent Appeals was in fact created by Congress as an Article III court.*

We now review the history of the Court of Customs and Patent Appeals to show that Congress in fact established it under Article III. *Infra*, pp. 75–97. We then attempt to demonstrate that *Ex parte Bakelite Corporation*, 279 U.S. 438, in which this Court decided to the contrary, reached an erroneous conclusion; and further argue that any doubt should be resolved, in the light of the formal and authoritative 1958 declaration by the court's creator, in favor of the court's genesis under Article III. *Infra*, pp. 97–108. Finally, we contend that there is no constitutional obstacle to giving effect to Congress's declaration. *Infra, pp.* 108–125.

(*a*). *The court's history shows that Congress established it pursuant to Article III.*

(*1*). *The creation and history of the court.*

i. The Court of Customs and Patent Appeals—originally the Court of Customs Appeals—was created by the Payne-Aldrich Tariff Act of August 5, 1909 (c. 6, § 28, 36 Stat. 11, 91, 105–108), to review the customs decisions of the Board of General Appraisers (now the Customs Court). The 1909 Act added to the Customs Administration Act of June 10, 1890, c. 407, 26 Stat. 131, a new section, 29, which read in part as follows (1st and 2d pars., 36 Stat. 105; Appendix A, *infra*, pp. 129–131):

> A United States Court of Customs Appeals is hereby created, and said court shall consist of a presiding judge and four associate judges appointed by the President, by and with the

advice and consent of the Senate, each of whom shall receive a salary of ten thousand dollars per annum.[40] It shall be a court of record, with jurisdiction as hereinafter established and limited.

Said court shall prescribe the form and style of its seal and the form of its writs and other process and procedure and exercise such powers conferred by law as may be conformable and necessary to the exercise of its jurisdiction. It shall have the services of a marshal, with the same duties and powers, under the regulations of the court, as are now provided for the marshal of the Supreme Court of the United States, so far as the same may be applicable. * * * The court shall appoint a clerk, * * * who shall perform and exercise the same duties and powers in regard to all matters within the jurisdiction of said court as are now exercised and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable. * * * The costs and fees in the said court shall be fixed and established by said court in a table of fees to be adopted and approved by the Supreme Court of the United States within four months after the organization of said court: *Provided,* That the costs and fees so fixed shall not, with respect to any item, exceed the costs and fees charged in the Supreme Court of the United States; and the same shall be expended, accounted for, and paid over to the Treasury of the United States. The court shall have power to establish all rules and regulations for the conduct of the business of the court and as may be needful for the uni-

[40] See *infra*, pp. 86–88.

formity of decisions within its jurisdiction as conferred by law.

* * * * *

The similarities between the above language and that of the Act which established the circuit courts of appeals, indisputably Article III courts, are sufficiently striking to invite comparison. Section 2 of the latter Act (Act of March 3, 1891, c. 517, 26 Stat. 826–827) provided in part:

> There is hereby created in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record with appellate jurisdiction, as is hereafter limited and established. Such court shall prescribe the form and style of its seal and the form of writs and other process and procedure as may be conformable to the exercise of its jurisdiction as shall be conferred by law. It shall have the appointment of the marshal of the court [*sic*] with the same duties and powers under the regulations of the court as are now provided for the marshal of the Supreme Court of the United States, so far as the same may be applicable. The court shall also appoint a clerk, who shall perform and exercise the same duties and powers in regard to all matters within its jurisdiction as are now exercised and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable. * * * The costs and fees in the Supreme Court now provided for by law shall be costs and fees in the circuit courts of appeals; and the same shall be expended, accounted for, and paid for, and paid over to the

> Treasury Department of the United States in the same manner as is provided in respect of the costs and fees in the Supreme Court.
>
> The court shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law.

The presiding judge of the newly created court was to be so designated in the commission issued him by the President, the associate judges were to have precedence according to the dates of their commissions, a quorum was to consist of any three judges, and the concurrence of three judges was to be necessary to any decision. § 29, 4th par., 36 Stat. 105; Appendix A, *infra,* p. 131. A court reporter and the publication of the court's decisions were provided for. § 29, 15th par., 36 Stat. 107–108; Appendix A, *infra,* pp. 135–136.

ii. In the event of one or two vacancies on the court, or the temporary inability or disqualification of one or two judges, the President was authorized, upon request of the presiding judge, to designate any qualified United States circuit or district judge or judges to act. § 29, 12th par., 36 Stat. 107; Appendix A, *infra,* p. 135. Upon the enactment of the Judicial Code of 1911 (see *infra,* pp. 88–89), this provision continued in effect as Section 188 (36 Stat. 1143). It remained in effect until 1948 (see 28 U.S.C. [1946 ed.] 301), when, upon the codification of present Title 28, the power of designation was transferred from the President to the Chief Justice and was broadened and generalized so as to eliminate the limitation of the designating power to the filling of "one or two"

vacancies. Section 293 of Title 28, U.S.C., as codified by the Act of June 25, 1948, c. 646, § 1, 62 Stat. 869, 901. The power of designation has since been further broadened. Under present law, all circuit and district judges and all judges of the Court of Claims and the Customs Court are statutorily eligible for service by designation on the Court of Customs and Patent Appeals. 28 U.S.C. 291(b), 292(d), 293(d). See also *infra*, pp. 90–91, 94–95.

iii. As in the case of the Act which first created the district and circuit courts (Judiciary Act of September 24, 1789, c. 20, §§ 2–4, 1 Stat. 73–75) and implemented the clause of Article III, Section 1, of the Constitution, creating this Court by defining the number of justices who should constitute it and the number needed to constitute a quorum (*id.*, § 1, 1 Stat. 73), no provision applicable to the tenure of the judges was included. It was assumed throughout the debates on the bill that the judges of the new court would hold office during good behavior. See, *e.g.*, 44 Cong. Rec. 4185–4225. Thus, Senator McCumber, on behalf of the Committee on Finance (which had reported favorably on the proposal to establish the court), in referring to the need for greater uniformity in the adjudication of customs cases and for a court staffed with judges proficient in knowledge of the technical aspects of this field of law, said (44 Cong. Rec. 4199):

> [I]t was thought best to have a court whose whole attention, whose whole life work, should be given to that particular subject.

Similarly, Senator Dolliver, an opponent of the bill, questioned the need for "this new judicial tribunal, with a life term of office" (44 Cong. Rec. 4188), and referred to the proposed court as "a new court in the United States with lifelong tenure." 44 Cong. Rec. 4187.[41] So far as we are aware, it has never been doubted that the judges of the court have from the beginning held tenure during good behavior.[42]

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[41] Compare Representative Payne's statement during the House debates (44 Cong. Rec. 4697):

> [The circuit courts] do not seem to have given them [customs cases] the consideration which their importance demands We propose a district court that will have nothing else to do but to give its entire time to these questions, and we propose a salary of $10,000 a year, so that the President can select them from those standing highest in their profession, great lawyers, who by the dignity of the position and the salary that is attached to it and the location of the court in the city of Washington will be induced to take these places, that they may become trained experts in tariff law, and so that we may have uniformity of decisions.

[42] In *In re Frischer & Co.*, 16 Ct. Cust. App. 191 (1928)—the decision which gave rise to this Court's *Bakelite* decision (see *infra*, pp. 98-102)—the Court of Customs Appeals, nineteen years after its creation, stated that the judges of the court "were commissioned for life" (p. 199), and cited evidence from the legislative history of the organic act showing such to have been the legislative intent (pp. 198–199). This Court, in the *Bakelite* case, did not question the fact of the judges' tenure during good behavior, but held it to be inconclusive as to the court's character as a constitutional or legislative tribunal. 279 U.S. at 459-460.

In 1930, Congress expressly provided—for the first time—that the judges of the Court of Customs and Patent Appeals should hold office during good behavior. Section 646 of the Tariff Act of June 17, 1930, c. 497, 46 Stat. 762. It is evident, however, from what has been said that the purpose of this

ir. The court was given "exclusive appellate jurisdiction" to review—at the instance either of importers of merchandise or the collectors of customs at the several ports—all final decisions of the Board of General Appraisers (the predecessor of the United States Customs Court),[11] both as to law and fact, in

provision was to make explicit what had previously been understood. Thus, Representative Hawley, in explaining the purpose of the proposed amendment during the debates in the House, stated that, as a consequence of the then-recent *Bakelite* decision, holding the Court of Customs and Patent Appeals to be "a legislative tribunal and not a constitutional court," the members of the court "do not have a term of office unless it was specially provided," and that the amendment would "give them the usual tenure of office during good behavior." 71 Cong. Rec. 2042. And see the comment of Representative Chindblom, immediately following, that "When this court was established it was believed to be a constitutional court [and] that it was not necessary to fix the term." 71 Cong. Rec. 2043. That the purpose was to make explicit what had formerly been assumed would appear to be confirmed by the further provision of Section 646 that: "For the purposes of section 260 of the Judicial Code, as amended, (relating to the resignation and retirement of judges of courts of the United States) any service heretofore rendered by any present or former judge of such court, including service rendered prior to March 2, 1929 [the date as of which its patent jurisdiction was transferred to it and its name was changed to the Court of Customs and Patent Appeals; see *infra*, pp. 91–92, 116 ff.], shall be considered as having been rendered under an appointment to hold office during good behavior."

[11] The Board of General Appraisers was created by Section 12 of the Customs Administration Act of 1890, c. 407, 26 Stat. 131, 136. In 1926, its name was changed to the United States Customs Court, without any accompanying change in its powers, organization, or membership. Act of May 28, 1926, c. 411, 44 Stat. (Part 2) 669. The history of the Board-court is summarized in Appendix B, *infra*, pp. 137–141. As there pointed out, the purpose of the 1926 Act was to make what

cases respecting the "classification of merchandise and the rate of duty imposed thereon under such classification," the "fees and charges connected therewith;" "all appealable questions as to the jurisdiction of" the Board, and "all appealable questions as to the laws and regulations governing the collection of the customs revenues." § 29, 7th par., 36 Stat. 106; Appendix A, *infra*, pp. 132–133. The judgments of the court were made final.[45] *Ibid.*

The jurisdiction thus vested in the new court had previously been exercised by the circuit courts, the circuit courts of appeals, and this Court. Under Section 15 of the Customs Administration Act of 1890 (the Act which created the Board of General Appraisers), appeals lay to the circuit courts from decisions of the Board of General Appraisers in all classification and rate-of-duty cases, with certain limited rights of appeal to this Court. 26 Stat. 138.

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was a court in fact (and had been repeatedly so held), a court in name as well, to prevent confusion and misunderstanding. In 1956, Congress declared the Customs Court to be a court established under Article III of the Constitution. *Supra*, pp. 67–68, 72. Unlike the judges of the Court of Customs and Patent Appeals, who have enjoyed tenure during good behavior from the time of the court's creation (see *supra*, pp. 79–80), the judges of the Customs Court have possessed unqualified tenure during good behavior only since 1930. Appendix B, *infra*, pp. 138–140. Prior to that time, the President had the power (for stated causes) to remove its members. (From 1908 to 1930 the members of the Board-court held office "during good behavior", but subject to the President's removal power.)

[44] Now (as later amended) 28 U.S.C. 1541.

[45] It was not until 1914, five years after the creation of the Court of Customs Appeals, that this Court was given certiorari jurisdiction to review final judgments of that court. Act of August 22, 1914, c. 267, 38 Stat. 703. See *infra*, pp. 89–90.

In the following year, the circuit courts of appeals were created and given general appellate jurisdiction over final decisions of the circuit and district courts (except where direct appeal to this Court was authorized), with certificate and certiorari jurisdiction in this Court. Act of March 3, 1891, c. 517, §§ 5–6, 26 Stat. 826, 827–828.[46] Pursuant to these provisions, from the time of the creation of the Board of General Appraisers in 1890 until the vesting of exclusive appellate jurisdiction over the Board's decisions in the Court of Customs Appeals by the Payne-Aldrich Act of 1909 (*supra*, pp. 81–82), appeals from the Board's decisions were heard by the circuit courts, followed in many instances by further review by the circuit courts of appeals and this Court.[47] The debates in

[46] See also the Act of May 27, 1908, c. 205, § 2, 35 Stat. 404, amending Section 15 of the Customs Administration Act of 1890, so as to interpose circuit court of appeals review of Board of General Appraisers decisions between review by the circuit courts and review by this Court.

[47] Among the decisions which reached this Court were *United States* v. *Ballin*, 144 U.S. 1 (1892); *United States* v. *Jahn*, 155 U.S. 109 (1894); *United States* v. *Burr*, 159 U.S. 78 (1895); *United States* v. *Passavant*, 169 U.S. 16 (1898); *United States* v. *Salambier*, 170 U.S. 621 (1898); *United States* v. *Lies*, 170 U.S. 628 (1898); *United States* v. *Ranlett and Stone*, 172 U.S. 133 (1898); *Hoeninghaus* v. *United States*, 172 U.S. 622 (1899); *American Sugar Refining Co.* v. *United States*, 181 U.S. 610 (1901); *Lawder* v. *Stone*, 187 U.S. 281 (1902); *Downs* v. *United States*, 187 U.S. 496 (1903); *United States* v. *American Sugar Refining Co.*, 202 U.S. 563 (1906); *Franklin Sugar Co.* v. *United States*, 202 U.S. 580 (1906); *United States* v. *G. Falk & Brother*, 204 U.S. 143 (1907); *Goat and Sheepskin Co.* v. *United States*, 206 U.S. 194 (1907); *Faber* v. *United States*, 221 U.S. 649 (1911); *Altman & Co.* v. *United States*, 224 U.S. 583 (1912); see also *Anglo-Californian Bank* v. *United States*, 175 U.S. 37 (1899).

Congress, moreover, reflect Congress's full awareness that the jurisdiction which the bill would vest in the new court would be carved from jurisdiction previously exercised by the regular federal courts. See, *e.g.*, 44 Cong. Rec. 4185–4196, 4202, 4220, 4697–4698.[a]

Appeals to "any other court" than the newly established court from decisions of the Board of General Appraisers were specifically prohibited. § 29 (of the 1890 Act, as amended by the 1909 Act, see *supra*), 6th par., 36 Stat. 106; Appendix A, *infra*, pp. 131–132. A *proviso* to the latter paragraph preserved the jurisdiction of this Court to hear and decide cases already certified to it from circuit courts of appeals and to review by writ of certiorari any case which had already been decided by, or which (being then pending) was there-

[a] Illustrative of the tenor of much of the debates was the statement by Senator Dolliver, an opponent of the legislation: "Now, then, the only question left is whether these courts [the Circuit Court for the Southern District of New York, the Circuit Court of Appeals for the Second Circuit, and this Court] are so burdened by this litigation [appeals from the Board of General Appraisers] as to require relief." 44 Cong. Rec. 4187. See also the statistics concerning appeals from the Board of General Appraisers, decided by the Circuit Court for the Southern District of New York and the Circuit Court of Appeals for the Second Circuit during the year May 1, 1908, through April 30, 1909, which Senator Borah (also an opponent of the bill) inserted in the Congressional Record during the debates. 44 Cong. Rec. 4186. And see the statements of Representative Payne, the sponsor of the measure in the House, criticizing the manner in which appeals from decisions of the Board of General Appraisers were then being handled in the circuit courts and circuit courts of appeals, and expressing the view that channeling all such appeals to a single customs appeals court, as proposed by the bill, would produce desirable uniformity and improve the administration of justice in customs matters. 44 Cong. Rec. 4697, *supra*, p. 80, fn. 41.

after decided by, a circuit court of appeals, provided application for such writ was made within six months following passage of the Act. *Ibid.*; Appendix A, *infra*, p. 132. A further *proviso* stated that all customs cases which had previously been decided by a circuit, district, or territorial court and had not been removed from such court by appeal or writ or error, or which, having been submitted for decision, remained undecided as of the date of the Act's passage, might (*ibid.*; Appendix A, *infra*, p. 132)—

> be reviewed on appeal at the instance of either party by the United States Court of Customs Appeals, provided such appeal be taken within one year from the date of the entry of the order, judgment or decree sought to be reviewed.

As a consequence of this latter *proviso* (see also par. II, Appendix A, *infra*, pp. 134–135, providing for the transfer of cases from the circuit courts of appeals), many of the decisions of the Court of Customs Appeals during the early years of its existence involved cases transferred to that court from the circuit courts and circuit courts of appeals.[1] Not a few involved appeals from actual decisions of the circuit courts—the Court

[1] The cases reported at the following pages of volume 1 of the reports of the Court of Customs Appeals (covering the period June 22, 1910–April 24, 1911) were transferred from the circuit courts: 5, 29, 36, 47, 49, 82, 86, 93, 109, 115, 126, 146, 149, 158, 166, 168, 170, 171, 178, 181, 203, 205, 213, 220, 223, 228, 237, 239, 252, 255, 272, 279, 280, 287, 290, 297, 323, 334, 346, 353, 360, 385, 400, 404, 422, 426, 431, 437, 484, 489, 494, 510, 513, 518. For cases transferred from the circuit courts of appeals, see *id.*, pp. 10, 11, 16, 17, 25, 32, 53, 61, 79, 198, 562, 506. For later transferred cases, see, *e.g.*, vol. 2, pp. 1, 4, 9, 11, 43, 78, 89, 101, 116, 162, 181, 186, 189, 234, 237, 239, 243, 275, 278, 332, 336, 355, 512 (May 1, 1911–February 1, 1912)

of Customs Appeals affirming in some instances and in others reversing.[50] For example, the first reported decision of the Court of Customs Appeals was the reversal by that court of a decision of the Circuit Court for the Southern District of New York. *Hausen* v. *United States*, 1 Ct. Cust. App. 1 (1910).

c. On February 25, 1910, prior to the nomination or confirmation of any of the original judges of the then recently created Court of Customs Appeals,[51] the $10,000 salary initially fixed for its judges (see *supra*, p. 76) was changed to $7,000. Deficiencies Appropriations Act of February 25, 1910, c. 62, § 1, 36 Stat. 202, 214. The result was to equate the salaries to be paid judges of the Court of Customs Appeals with those then being received by circuit judges.[52] See Act of February 12, 1903, c. 547, 32 Stat. 825. This equiva-

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[50] For decisions of affirmance, see cases reported in volume 1 at pp. 10, 16, 17, 32, 34, 51, 53, 61, 79, 144, 198, 242, 328, 341, 362, and in volume 2 at pp. 43, 101, 162, 234. For decisions of reversal, see vol. 1, pp. 1, 14, 25, 171, 228, 263, 321; vol. 2, p. 249. In *Prosser* v. *United States*, 1 Ct. Cust. App. 550 (1911), the Court of Customs Appeals affirmed in part and reversed in part a circuit court decision (*United States* v. *Thomas Prosser & Son*, 177 Fed. 569 (C.C.S.D.N.Y., 1910)).

[51] The five original judges of the court were nominated on March 9, 1910, and confirmed on March 30, 1910. 45 Cong. Rec. 2959, 4003. (Four of these had been first nominated previously, on January 5, 1910, but the nominations were later withdrawn. 45 Cong. Rec. 322, 2205.)

[52] Since the salaries were reduced before the court was staffed, there was no violation of the prohibition of Article III, Section 1, against diminishing the compensation of judges appointed under that article during their continuance in office. The reduction thus provides no argument that Congress considered the newly established court to be a non-Article III court. On the contrary, the aligning of the compensation fixed for its judges with that being received by circuit judges would indi-

lence continued under the Judicial Code of 1911. See Sections 118, 188, 36 Stat. 1131, 1143. In 1919, Congress increased the salaries of circuit judges from $7,000 to $8,500 per year, and in the same Act provided that the judges of the Court of Customs Appeals should receive salaries "equal in amount to" those provided therein for circuit judges, thereby granting the former an equivalent increase. Act of February 25, 1919, c. 29, §§ 2, 5, 40 Stat. 1156, 1157. In subsequent Acts raising judicial salaries, the judges of the Court of Customs Appeals have been treated on a par with circuit judges. Act of December 13, 1926, c. 6, § 1, 44 Stat. (Part 2) 919 (increasing the salaries of both from $8,500 to $12,500); Act of July 31, 1946, c. 704, § 1, 60 Stat. 716 ($12,500 to $17,500); Act of March 2, 1955, c. 9, § 1 (b), (c), 69 Stat. 9, 10 ($17,500 to $25,500).[53]

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cate that Congress intended to treat the Court of Customs Appeals as on a par with the circuit courts of appeals, which are indisputably Article III courts.

[53] By Section 107(a)(5) of the Legislative Appropriations Act of June 30, 1932, c. 314, 47 Stat. 382, 402, Congress provided that, for the fiscal year ending June 30, 1933, the salaries of all judges "except judges whose compensation may not, under the Constitution, be diminished during their continuance in office" should be at the rate of $10,000 per annum if they were then at a rate exceeding that amount. As noted by petitioner, the judges of the Court of Customs and Patent Appeals voluntarily accepted a reduction in salary from $12,500 to $10,000 pursuant to this provision and—pursuant to a special provision authorizing the Treasury to accept from persons whose salaries were constitutionally immune to reduction such part of their pay as would otherwise not be paid them (§ 109, 47 Stat. 403)—specifically waived any constitutional exemption they might have had (Br. 47 n. 18). The action of the judges in so doing is, of course, understandable in the light of this Court's then recent decision in *Ex parte Bakelite Corporation*, 279 U.S.

The salaries established for the judges of the Court of Customs Appeals have always been greater than those fixed for district judges. Even as reduced by the Deficiencies Appropriation Act of 1910 (*supra*, p. 86), the salaries of $7,000 payable to the judges of the Court of Customs Appeals were $1,000 higher than those then being received by district judges. See Act of February 12, 1903, c. 547, 32 Stat. 825. The difference in their respective compensations has been widened by later Acts providing for pay increases.[54]

vi. When the Judicial Code was enacted in 1911 (Act of March 3, 1911, c. 231, 36 Stat. 1087), the provisions pertaining to the establishment, powers, and jurisdiction of the Court of Customs Appeals were transferred to the Code (with amendments not here pertinent) and codified as Chapter Eight (§§ 188–199, 36 Stat. 1143–1146) together with the provisions relating to the district courts, (Chapters One through Five), the circuit courts of appeals (Chapter Six), the Court of Claims[55] (Chapter Seven), the former

438 (1929), holding the court to be a legislative court whose judges did not enjoy the protection afforded by Article III. The statutory provision itself, however, did not evidence any congressional understanding whether the judges of the Court of Customs and Patent Appeals would be subject to the reduction in compensation. It was general in language, mentioning no court by name. For this reason, the 1932 Act is without significance on the issue of the kind of court Congress intended to establish when it created the Court of Customs Appeals. Moreover, since the judges voluntarily waived any claim of exemption they might have had, their action did not involve an acknowledgment that they were subject to the Act.

[54] Act of December 13, 1926, c. 6, § 1, 44 Stat. (Part 2) 919; Act of March 2, 1955, c. 9, § 1(c), (e), 69 Stat. 9, 10. The differential is now $3,000. 28 U.S.C. 135, 213.

[55] As to the status of the Court of Claims, see *supra*, pp. 67–69, and *infra*, pp. 102–106, 108–116, 123–125.

Commerce Court [58] (Chapter Nine), and this Court (Chapter Ten). 36 Stat. 1087–1143, 1146–1160.

vii. In 1914, this Court, for the first time, was given limited certiorari jurisdiction to review cases from the Court of Customs Appeals. Act of August 22, 1914, c. 267, 38 Stat. 703. The Act gave this Court power to review final judgments of that court in cases in which construction of the Constitution or of a treaty was drawn in issue; in addition, the Court was authorized to hear and decide any case pending in the Court of Customs Appeals if the Attorney General, before

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[58] The Commerce Court, created by the Act of June 18, 1910, c. 309, § 1, 36 Stat. 539, and abolished three years later by the Act of October 22, 1913, c. 32, § 1, 38 Stat. 208, 219, was certainly an Article III court. See Frankfurter and Landis, *The Business of the Supreme Court* (1928), pp. 168–169; Katz, *Federal Legislative Courts*, 43 Harv. L. Rev. 894, 912 (fn. 84); 915–916 (1930); *Hallowell* v. *Commons*, 210 Fed. 793, 798 (C.A. 8). The Act creating the court provided that it should be composed of five judges, to be from time to time designated and assigned thereto by the Chief Justice for five-year periods from among the circuit judges, except that initially it was to be composed of five additional circuit judges to be appointed by the President (for service during good behavior). The periods of service on the Commerce Court of the five new judges were to be for one, two, three, four, and five years, respectively, in order that the period of designation of one of the new judges should expire in each year thereafter, and so as to permit a system of rotation of assignments of circuit judges to the new court. 36 Stat. 540. The Act abolishing the court provided that nothing in the Act should be "deemed to affect the tenure of" any of the judges then acting as circuit judges by appointment under the Act which created the court. Those judges were to "continue to act under assignment * * * as judges of the district courts and circuit courts of appeals," but on their deaths, resignations, or removals from office their offices were to be abolished and no successors appointed. 38 Stat. 219.

judgment, should certify that the case was of such importance as to make review by this Court expedient. *Ibid.* In 1930, the limitations on the Court's jurisdiction created by the 1914 Act were eliminated (Tariff Act of June 17, 1930, c. 497, § 647, 46 Stat. 762), as a consequence of which the Court has since had general certiorari jurisdiction with respect to customs cases from the Court of Customs Appeals. See 28 U.S.C. 1256. Pursuant to the power thus granted, this Court has heard and determined many cases on certiorari to that court.[57]

viii. On September 14, 1922, the judges of the Court of Customs Appeals were made eligible, on designation of the Chief Justice of the United States, for service on the Court of Appeals and Supreme Court (now District Court) of the District of Columbia. Act of September 14, 1922, c. 306, § 5, 42 Stat. 839. The latter courts were and are Article III courts. *O'Donoghue* v. *United States*, 289 U.S. 516 (rejecting *dictum* to the contrary, see p. 550, in *Ex parte Bakelite Corporation*, 279 U.S. 438, 460). This provision remained in effect until 1958, when it was broadened to include service on any court of appeals or district

[57] See *Five Per Cent. Discount Cases*, 243 U.S. 97; *Nicholas [illegible] Co.* v. *United States*, 249 U.S. 34; *Vitelli & Son* v. *United States*, 250 U.S. 355; *United States* v. *Aetna Explosives Co.*, 256 U.S. 402; *United States* v. *Rice & Co.*, 257 U.S. 536; *United States* v. *Fish*, 268 U.S. 607; *United States* v. *Stone & Downer Co.*, 274 U.S. 225; *Hampton & Co.* v. *United States*, 276 U.S. 394; *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294; *Board of Trustees of the University of Illinois* v. *United States*, 289 U.S. 48; *United States* v. *Bush & Co.*, 310 U.S. 371; *Barr* v. *United States*, 324 U.S. 83.

court.[58] Judges of the Court of Customs and Patent Appeals are now eligible by statute for service on any court of appeals, any district court, the Court of Claims, and the Customs Court. 28 U.S.C. 293(a), 293(c).

ix. On September 21, 1922, the jurisdiction of the Court of Customs Appeals was enlarged to include appeals, on questions of law only, from findings of the United States Tariff Commission in proceedings relating to unfair practices in the import trade. Tariff Act of September 21, 1922, c. 356, § 316(c), 42 Stat. 858, 943.[59] It is this aspect of its jurisdiction that was involved in *Ex parte Bakelite Corporation,* 279 U.S. 438, see *infra,* pp. 97–102.

x. In 1929, the patent and trade-mark jurisdiction of the Court of Appeals of the District of Columbia was transferred to the Court of Customs Appeals and the name of the court was changed to the Court of Customs and Patent Appeals. Act of March 2, 1929, c. 488, §§ 1, 2, 45 Stat. 1475.

The patent jurisdiction of the District of Columbia Court of Appeals transferred by this Act rested on Rev. Stats. 4909, 4911–4914, as amended (35 U.S.C., Compact Ed. [1928 Supp. to 1926 ed.] 57, 59a–62).

[58] 28 U.S.C. (1926, 1934, 1940 eds.) 22; 28 U.S.C. (1946 ed.) 22(a); 28 U.S.C. (1952 ed.) 291(b); Act of August 25, 1958, § 4, 72 Stat. 848.

[59] Now 28 U.S.C. 1543; U.S.C. 1337(c).

Under these provisions, if an applicant for a patent was dissatisfied with the decision of the "board of appeals" in the Patent Office (consisting of the Patent Commissioner and certain other Patent Office officials), he could appeal to the Court of Appeals of the District of Columbia, which was authorized to revise the decision of the board on the basis of the evidence produced in the Patent Office. The court thereafter returned to the commissioner a certificate of its proceedings and its decision, which "govern[ed] the further proceedings in the case." The court's decision did not preclude any interested person from contesting the validity of the patent (if one was granted) in any court wherein it might be called in question. The court's trade-mark jurisdiction was based on Section 9 of the Act of February 20, 1905, c. 592, 33 Stat. 727 (15 U.S.C., Compact Ed., 89), providing that an applicant for the registration or cancellation of a trade-mark (or a party to an interference as to a trade-mark, or one opposing the registration of a trade-mark), if dissatisfied with the decision of the Patent Commissioner, could appeal to the Court of Appeals of the District of Columbia under the same rules of practice and procedure, so far as applicable, as governed in the case of patent appeals. In *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693, the patent and trade-mark jurisdiction of the District of Columbia Court of Appeals was held to be administrative rather than judicial in nature (see *infra*, pp. 116–121). The patent and trade-mark jurisdiction of the Court of Customs and Patent Appeals now rests on 28 U.S.C. 1542.

cf. Finally, to complete the history, in 1958 (as has been noted) Congress amended 28 U.S.C. 211 (the Code successor to the original creating Act) so as officially to declare the court to be one established under Article III of the Constitution. Act of August 25, 1958, § 1, 72 Stat. 848; *supra*, pp. 66–74.

The currently applicable provisions pertaining to the constitution, jurisdiction, and procedure of the court are contained in 28 U.S.C. 211–216, 1541–1543, 2601–2602.

(2). *The congressional purpose to establish the court as an Article III tribunal.*

The conclusion to be drawn from the foregoing summary is, we submit, that it was the congressional purpose, in creating the Court of Customs Appeals, to establish an Article III tribunal. Like the Commerce Court, the tribunal was to be one with limited subject-matter jurisdiction but general geographical jurisdiction—the converse, in this respect, of the regular federal courts, whose jurisdiction over subject matter is general, but whose geographical jurisdiction is limited.

i. The court's subject matter.—The subject matter committed to the new court was federal and judicial in nature. Customs cases arise under the Constitution, federal laws, or treaties, and therefore fall within the judicial power granted by Article III, Section 2, of the Constitution. And there can be no doubt that, on the creation of the court in 1909, its duties were wholly judicial. See *infra*, pp. 108–114.[39]

[39] We show below, at pp. 115–116, that it was not until 1925 that the court was given duties which might be considered non-

ii. The parallel between the language creating the Court of Customs Appeals and that creating the circuit courts of appeals.—The striking parallelism of language between the statute which created the Court of Customs Appeals and that under which the circuit courts of appeals were formed eight years earlier (*supra*, pp. 75–78) indicates that the same source of constitutional authority was invoked by Congress on each occasion. Since the source of power in the case of the circuit courts of appeals was indisputably Article III, there is a clear inference that Article III was also the source of the power Congress exercised in establishing the Court of Customs Appeals.

iii. The eligibility of circuit and district judges to sit on the Court of Customs Appeals.—From the beginning, Congress authorized the President, in the event of one or two vacancies on the court, or the temporary inability or disqualification of one or two judges, to designate any qualified circuit or district judge or judges temporarily to fill the vacancy or vacancies or to act in place of the judge or judges so disabled or disqualified. The same provision was continued under the Judicial Code of 1911 and remained in effect until 1948, when the power of designation was transferred to the Chief Justice and broadened so as to eliminate the limitation of the power of designation to the filling of "one or two" vacancies. It has since been further broadened, so that now all circuit and district judges as well as judges of the Court of Claims and the Customs Court

judicial, and that these additional functions did not change the character of the court.

are statutorily eligible for service by designation on the Court of Customs and Patent Appeals. *Supra*, pp. 78–79. This history affords another striking indication of Congress' understanding that it was creating an Article III court when it established the Court of Customs Appeals.

iv. The tenure of the judges.—We have pointed out the virtually conclusive proof that Congress intended the judges of the court to have life tenure, and the fact that they have actually enjoyed such tenure (see *supra*, pp. 79–81). Since the organic act was silent with respect to tenure, the inference is that Congress understood that tenure during good behavior attached to the offices automatically, by the command of Article III, Section 1, of the Constitution. As remarked by the Court of Customs Appeals itself in *In re Frischer & Co.*, 16 Ct. Cust. App. 191, 199 (1928):

> From what source, may we inquire, were the judges of this court given tenure during good behavior? There can be but one answer. Being an inferior court, created under section 1 of Article III of the Constitution, and, as such, exercising a portion of the judicial powers of the United States, said section, by its express terms, authorized said judges to "hold their offices during good behavior."

Cf. *McAllister* v. *United States*, 141 U.S. 174, 184–186. A student of the field (Katz, *Federal Legislative Courts*, 43 Harv. L. Rev. 894, 909 (1930)) has expressed the view that the absence of a provision as to tenure in the organic act creating the Court of Customs Appeals—

> would seem an almost conclusive indication that Congress assumed that the provisions of Article III of the Constitution would apply to the court and would control the tenure of the judges.

"One may therefore infer," the author concluded, "that Congress believed itself to be acting pursuant to Article III in creating the court." *Ibid.*

v. The carving out of the court's jurisdiction from the jurisdiction of the regular federal courts.—Another relevant factor is that the jurisdiction vested in the Court of Customs Appeals was carved from jurisdiction previously exercised by the regular federal courts—the circuit courts, circuit courts of appeals, and this Court (*supra*, pp. 81–86). See *In re Frischer & Co.*, 16 Ct. Cust. App. 191, 198. Not only was the new court to exercise exclusive appellate jurisdiction in a class of cases which the regular federal courts had previously heard; in addition, provision was made for the transfer to the new court of cases pending in the circuit courts and circuit courts of appeals on the effective date of the new court's creation, including cases which had been decided by the circuit courts. Thus, the view that Congress established the Court of Customs Appeals as a mere legislative court requires the surprising conclusion that a non-Article III court—pursuant to a statutory scheme specifically authorized by Congress—sat on many occasions during its early years as an appellate tribunal reviewing judgments of Article III courts.

vi. Congress's treatment of the judges of the Court of Customs Appeals as on a par with circuit judges in

matters of salary.—The fact that from the beginning Congress has treated the judges of the Court of Customs Appeals as on a par with circuit judges in matters relating to compensation (*supra*, pp. 86–88) similarly shows its conception of the Court of Customs Appeals and the circuit courts of appeals as equivalent in dignity, and indirectly reflects its understanding of the Article III origin and status of the court. See *O'Donoghue* v. *United States*, 289 U.S. 516, 549.

vii. The eligibility, since 1922, of judges of the Court of Customs Appeals to sit on the superior courts of the District of Columbia.—Since 1922, the judges of the Court of Customs Appeals have been eligible by statute, on designation of the Chief Justice of the United States, for service on the Court of Appeals and Supreme Court (now District Court) of the District of Columbia, both of which are Article III courts (*O'Donoghue* v. *United States*, 289 U.S. 516). *Supra*, pp. 90–91. This eligibility was broadened in 1958 to include service on any court of appeals or district court. *Supra*, pp. 90–91.

(b). *The decision in Ex parte Bakelite Corporation, 279 U.S. 438, should be reexamined and held no longer effective.*

In *Ex parte Bakelite Corporation*, 279 U.S. 438, this Court held in 1929 that the Court of Customs Appeals was a legislative court, created by Congress under its Article I power to lay and collect duties on imports (Art. I, Section 8, Cl. 1), and deriving none of its authority from Article III. We believe that this decision reached an erroneous conclusion on the

basis of mistaken premises and failed adequately to take into account the historical materials we have summarized. For these reasons, and in the light of the intervening authoritative declaration by Congress that it established the court under Article III, we submit that the *Bakelite* decision should be reexamined and held to be no longer effective.

(*1*). The *Bakelite* case arose under the Court of Customs Appeals' jurisdiction (first given it in 1922) to hear appeals on questions of law from findings of the Tariff Commission in proceedings under Section 316 of the Tariff Act of 1922,[61] relating to unfair practices in the import trade. At issue was whether such an appeal involved a justiciable case or controversy within Article III, Section 2, of the Constitution, which in turn was thought to depend on whether the decision was binding on, or merely advisory to, the President. Pursuant to the provisions of Section 316 (see 279 U.S. at 446–447),[62]

[61] Act of September 21, 1922, c. 356, 42 Stat. 858, 943; now, as amended, 19 U.S.C. 1337. The court's jurisdiction derived from subsection (c) of Section 316 (19 U.S.C. 1337(c)). See also 28 U.S.C. 1543.

[62] Briefly, they provided that the President, whenever the existence of unfair methods of competition or unfair acts in the import trade were established to his satisfaction, might affix additional duties on the offending imports or, in extreme cases, exclude them from entry altogether, the President's decision to be "conclusive" (§ 316 (a), (e), 42 Stat. 943–944). "[T]o assist the President", the Tariff Commission was to investigate allegations of unfair practice, conduct hearings, receive evidence, and make findings and recommendations to the President, the findings to be "conclusive" if "supported by evidence", but subject to appeal by the importer to the Court of Customs Appeals, if adverse, on "questions of law

the Bakelite Corporation, a domestic manufacturer, invoked the investigative jurisdiction of the Tariff Commission as against competing importers. The Tariff Commission made findings favorable to Bakelite and recommended that the President exclude from entry the competing products of the importers. The importers appealed to the Court of Customs Appeals. The Bakelite Corporation, by motion to dismiss, challenged the jurisdiction of the court on the ground that no case or controversy within Article III, Section 2, was involved, and that the court, as an inferior

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only" (§ 316 (b), (c)). The judgment of the Court of Customs Appeals was to be "final", subject to review by this Court on certiorari (§ 316(c)). The "final findings" of the Tariff Commission (as revised, if necessary, as a consequence of any appeal that might be taken) were to be "transmitted with the record to the President" for his consideration and action (§ 316(d)).

This Court's certiorari jurisdiction over this class of case was repealed by the Tariff Act of 1930. Act of June 17, 1930, c. 497, § 337(c), 46 Stat. 590, 703 (19 U.S.C. 1337(c)). The Senate Finance Committee's report on the bill which became the 1930 Act indicated that the reason for eliminating this Court's reviewing authority was that the President was not bound by any decision of the courts in the matter; that, as a result of this lack of finality, no "case or controversy" within Article III was presented in the appellate proceedings under the section; and that Congress could not constitutionally give this Court jurisdiction over such proceedings. The committee stated further that the provision for review by the Court of Customs and Patent Appeals was being retained because that court, "being a 'legislative' court and not a 'constitutional' court," might receive this "jurisdiction of a proceeding the judgment in which is merely advisory to discretionary action by the President." This Court's *Bakelite* decision, which had been decided approximately four months prior to the date of the committee report, was, among others, cited by the committee for these views. S. Rept. 37, 71st Cong., 1st sess., p. 67, on H.R. 2667.

court established under Article III, had jurisdiction only of such cases and controversies. The Court of Customs Appeals upheld its jurisdiction and denied the motion to dismiss. *In re Frischer & Co.*, 16 Ct. Cust. App. 191. Although "[b]oth sides to the controversy" conceded the court's Article III status (16 Ct. Cust. App. at 196), the court considered the question at length and held that it had been established under Article III. *Id.*, pp. 196–203. Rejecting, however, the contention that the appeal did not involve a case or controversy within Article III, Section 2, the court sustained its jurisdiction. *Id.*, pp. 203–214.

In this Court, the case began with a petition by the Bakelite Corporation for an original writ of prohibition forbidding the Court of Customs Appeals to entertain the appeal, on the ground that no case or controversy was presented. All parties to this Court—the Bakelite Corporation, the Solicitor General (on behalf of the Court of Customs Appeals), and the importers (intervening by special leave of Court)—were in agreement that the Court of Customs Appeals was an inferior court established under Article III.[63]

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[63] No. 17, Original, Oct. Term, 1928: Motion and Petition for Writ of Prohibition, pp. 21–22; Supplemental Brief on behalf of the Bakelite Corporation, Petitioner, on the Subject of the Constitutional Character of the United States Court of Customs Appeals, pp. 3–28; Brief of Solicitor General on behalf of the United States Court of Customs Appeals, pp. 32–38; Petition and Brief on behalf of Frischer & Co., Inc., et al., for Leave to Intervene, p. 12. The Bakelite Corporation argued the matter at considerable length. See Supplemental Brief, *supra*, filed by leave of Court granted January 14, 1929. The brief of the Solicitor General argued the point at con-

This Court found it unnecessary to reach the merits—whether the appeal to the Court of Customs Appeals involved a case or controversy within Article III—because, it held, the court was not a tribunal established under Article III but a legislative court, "created by Congress in virtue of its power to lay and collect duties on imports." 279 U.S. at 458. The rationale is contained in the following passages of the opinion (279 U.S. at 458, 459):

> The Court of Customs Appeals was created by Congress in virtue of its power to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution. The full province of the court under the act creating it is that of determining matters arising between the Government and others in the executive administration and application of the customs laws. These matters are brought before it by appeals from decisions of the Customs Court, formerly called the Board of General Appraisers. The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers. True, the provisions of the customs laws requiring duties to be paid and turned into the Treasury promptly, without awaiting disposal of protests against rulings of appraisers and collectors, operate in many instances to convert the protests into applications

siderable but lesser length. The brief of the intervening importers merely acknowledged that all parties to the proceeding conceded the Article III status of the Court of Customs Appeals (p. 12).

> to refund part or all of the money paid; but this does not make the matters involved in the protests any the less susceptible of determination by executive officers. In fact their final determination has been at times confided to the Secretary of the Treasury, with no recourse to judicial proceedings. [Footnotes omitted.]
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> * * * * *
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> [The argument as to the tenure of the judges] mistakenly assumes that whether a court is of one class or the other depend on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred.

The basic premises of the *Bakelite* opinion, in short, were (a) that a court in which Congress vests jurisdiction it is not required to place in any court is necessarily a legislative tribunal which cannot be established under Article III, and (b) that Congress created the Court of Customs Appeals under Article I, not Article III. In our view, both of these interrelated assumptions were mistaken.

(2). There is no principle requiring Congress to vest in the Article III courts only those matters "which inherently or necessarily require judicial determination", and prohibiting it from requiring Article III judicial determination of matters *capable* of administrative settlement. On the contrary, there are many areas in which Congress can choose to provide either a judicial remedy or an administrative procedure. This was made clear, over a century ago, in *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272. The question in that case was the

validity of a distress warrant, issued by the solicitor of the Treasury Department against the property of a collector of customs to satisfy a balance owing to the United States arising from a shortage in the collector's accounts. The plaintiff, who challenged the validity of the warrant, contended that its issuance constituted an exercise of the judicial power of the United States and hence was void because not the act of a court ordained and established by Congress under Article III. 18 How. at 275. This Court agreed that "if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void," because "the officers who performed these acts could exercise no part of that judicial power." *Ibid.* The Court held, however, that the actions of the executive officers did not constitute the exercise of judicial power, yet were consistent with due process of law, because Congress, under its plenary power over the customs revenues, had authority to enforce the Treasury's rights against defalcating collectors through exclusively executive processes. P. 281. The Court "d[id] not doubt the power of congress to provide by law that such a question shall form the subject-matter of a suit in which the judicial power can be exerted" (*ibid.*), but held that provision for such judicial action was not constitutionally required. The Court then said (18 How. at 284):

> To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which,

from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. *At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.* * * * [Emphasis added.] [64]

See, to the same effect, *Fong Yue Ting v. United States*, 149 U.S. 698, 715, where this language was quoted in sustaining a statute providing for the judicial deportation of aliens found unlawfully within the country, the Court pointing out that Congress could have committed the subject entirely to executive officers (pp. 713–714, 728).

The practice of many decades gives firm support to this principle. As we have pointed out (*supra*, pp. 81–86, 96), prior to the establishment of the Court of Customs Appeals, the jurisdiction vested in that court had been exercised by the regular federal courts—following a period of purely executive determination. A substantial part of the present business of the federal district courts consists of matters which Congress could clearly commit to executive or adminis-

[64] The "courts of the United States" referred to in the quoted passage, and throughout the opinion, were the regular federal courts, and it was assumed that those courts would be exercising their normal Article III powers.

trative determination but has chosen to bring "within the cognizance of the courts of the United States", *e.g.*, money, contract, and tort claims against the government. Conversely, a number of present-day administrative tribunals carry on functions which could be, and have in the past been, vested in Article III courts. In some instances, too, the courts and administrative agencies now have concurrent or coordinate jurisdiction. For example, both the Federal Trade Commission and the courts (at the instance of the Department of Justice) enforce certain provisions of the Clayton Act.[35] In sum, the history of the federal courts and of federal agencies disproves the fundamental postulate on which the *Bakelite* opinion rests.

In addition, the jurisprudence of this Court gives no support—aside from the two cases following on the heels of *Bakelite* (*Williams* v. *United States*, 289 U.S. 553, and *O'Donoghue* v. *United States*, 289 U.S. 516)—to that primary premise that only legislative courts can "examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it." 279 U.S. at 451. None of the decisions cited to sustain this part of the *Bakelite* opinion suggests that proposition. In most of the cases, the tribunals involved, or about which the opinions spoke, were the regular federal courts, whose

[35] See also, *e.g.*, *Far East Conference* v. *United States*, 342 U.S. 570; *Maritime Board* v. *Isbrandtsen*, 356 U.S. 481; *Maryland and Virginia Milk Producers Assoc., Inc.* v. *United States*, 362 U.S. 458; *United States* v. *Radio Corp. of America*, 358 U.S. 334.

Article III status was and is unquestioned.[66] No attempt was made in the *Bakelite* opinion to reconcile its holding with these earlier decisions, which assumed the Article III status of those courts to which were submitted various matters not *requiring* judicial determination (though susceptible of it). And in the most recent case on legislative tribunals, *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, each of the four opinions (expressing various views) rejected, explicitly or implicitly, the notion that Article III courts are barred from considering matters not "inherently or necessarily" *requiring* "judicial determination".

(*3*). The second major premise of the *Bakelite* opinion—that Congress created the Court of Customs Appeals under Article I, not under Article III—is equally untenable. We have just shown that the susceptibility of customs claims to executive determination did not bar Congress from placing the decision of these cases in an Article III court. The history we have detailed above at pp. 75–97, shows that Congress thought and assumed that it was acting to create a special inferior court under Article III.[67] The

[66] See *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 275, 280–285; *Grisar* v. *McDowell*, 6 Wall. 363, 379; *Auffmordt* v. *Hedden*, 137 U.S. 310, 329; *In re Fassett*, 142 U.S. 479, 486–487; *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659–660; *Passavant* v. *United States*, 148 U.S. 214, 218–219; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 714–715, 727–732.

[67] The *Bakelite* opinion states that whether a court is legislative or constitutional does not depend upon "the intention of Congress" (279 U.S. at 459), but this means only that Congress's *characterization* of a court *as legislative or constitutional*

creation of such a special Article III court to exercise a particular type of jurisdiction is not at all foreign to our history." And, finally, we show below, at pp. 108–125, that no constitutional obstacle prevented Congress from acting under Article III: the original jurisdiction of the court is plainly within the "judicial power" granted by Article III, and its later-acquired jurisdiction did not divest it of Article III status.

(4). Our analysis of the *Bakelite* holding and rationale has thus far taken no account of the 1958 declaration by Congress that the Court of Customs and Patent Appeals was in fact established under Article III of the Constitution. See *supra*, pp. 66–74. Implicit in that declaration was the view of Congress that this Court, in *Ex parte Bakelite*, had misread the congressional purpose in establishing the court,

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is not controlling. This Court did not say that it was irrelevant what *power* Congress considered itself to be exercising. On the contrary, the same sentence of the *Bakelite* opinion declares that "the true test lies in the *power under which the court was created* and in the jurisdiction conferred" (emphasis added).

[56] Cf. the Emergency Court of Appeals, created by Section 204(c) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 31, 32 (50 U.S.C. App. 924(c)) (orders and price schedules of the former Office of Price Administration), and the former Commerce Court, created by the Act of June 18, 1910, c. 309, § 1, 36 Stat. 539, and abolished by the Act of October 22, 1913, c. 32, § 1, 38 Stat. 208, 219 (orders of the Interstate Commerce Commission). The Commerce Court was a constitutional court. See *supra*, p. 89, fn. 56. The Emergency Court of Appeals, at present inactive, though its life has not been formally terminated, consisted of three or more district or circuit judges designated by the Chief Justice. It was likewise a constitutional court. In our view, the Court of Claims and Customs Court are also Article III courts. See *supra*, 67 ff., 102–106, *infra*, pp. 108–116, 123–125.

and had erroneously characterized it as legislative. Whatever doubt might remain as to the soundness or unsoundness of the *Bakelite* decision, apart from the 1958 declaration, ought now to be resolved, we submit, in favor of the correctness of the congressional conclusion—*i.e.*, that *Bakelite* mistakenly construed the effect and intent of Congress's action in establishing the court. It needs no argument that this Court should accord great weight to a formal declaration by Congress, as the creator of a judicial tribunal, proclaiming which of its powers it exercised in bringing the tribunal into being. Particularly should this be so where the relevant history points directly to the conclusion that Congress actually created the Court of Customs and Patent Appeals in an exercise of its Article III authority—just as, in 1958, it said it did.

3. *There is no constitutional obstacle to the conclusion that the Court of Customs and Patent Appeals was validly established by Congress under Article III.*

(*a*). *The customs jurisdiction of the court has always been purely judicial in character, involving cases arising under the Constitution, laws, and treaties of the United States, and controversies to which the United States is a party.*

(*1*). *"Cases" and "controversies."*—The sole jurisdiction of the Court of Customs Appeals at the time of its creation in 1909, and during the first thirteen years of its existence, was the hearing of appeals (both as to law and fact), at the instance of importers or of the customs collectors, from final decisions of the Board of General Appraisers (now the United States Customs Court) in classification and rate-of-

duty cases arising under the customs laws of the United States, including questions relating to fees and charges and to the jurisdiction of the Board, and "all appealable questions as to the laws and regulations governing the collection of the customs revenues." § 29, 7th par., of the Customs Administration Act of 1890, c. 407, 26 Stat. 131, as amended by the Payne-Aldrich Tariff Act of 1909, c. 6, § 28, 36 Stat. 11, 91, 106; Appendix A, *infra*, pp. 132–133. See *supra*, pp. 81–86.[*] Its judgments in all such cases were, and are, "final". *Ibid.*; 28 U.S.C. 2601. Its customs decisions, thus, were and have always been beyond revision by either Congress or the Executive. Indeed, as we have noted (*supra*, pp. 82, 89–90), they were not even reviewable by this Court during the first five years of the lower court's existence.

Thus, there can be no doubt that the jurisdiction of the Court of Customs Appeals, from the time of its establishment in 1909 until the enactment of the Tariff Act of 1922 (see *supra*, pp. 91, 98–101), consisted exclusively of "cases", within the meaning of Article III, Section 2 of the Constitution. *Hayburn's Case*, 2 Dall. 409; *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 819; *United States* v. *Ferreira*, 13 How. 40, 46–50; *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 284; *Gordon* v. *United States*, 117 U.S. 697; *Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447, 487; *Muskrat* v. *United States*, 219 U.S. 346; *Tutun* v. *United States*, 270 U.S. 568, 576–

[*] Of course, the court still retains this jurisdiction (28 U.S.C. 1541), to which other powers have since been added. 28 U.S.C. 1542, 1543.

577. As observed by the Court of Customs Appeals itself in *In re Frischer & Co.*, 16 Ct. Cust. App. 191, 198 (1928):

> [I]n the creation and establishment of this court no jurisdiction was given to it except in "cases." In its original creation it was not within the contemplation of its creators to confer upon it jurisdiction to try administrative questions or matters not embraced within the terms of section 2 of Article III. Every case given to it *arises* under "the laws of the United States." * * * [Emphasis in the original.]

That the court's exclusive initial jurisdiction extended to "cases" in the constitutional sense is further shown by the fact that this jurisdiction was carved from authority previously exercised by the regular federal courts (*supra*, pp. 81-86, 96) and that this Court has on many occasions, since it was first given the power to do so in 1914, reviewed customs judgments of the Court of Customs Appeals on writ of certiorari. See cases cited *supra*, p. 90, fn. 57. That this Court has granted review in these cases confirms their judicial character, since the Court has always refused to hear, on the ground that it lacks the power to do so, matters which did not present a "case" or "controversy" within the scope of Article III. See cases cited *supra*, p. 109; also, *Keller v. Potomac Electric Co.*, 261 U.S. 428, 440-444; *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, 698-701.

(2). *"Arising under this Constitution, the Laws of the United States, and Treaties".*—There can also be no doubt that the "cases" with which the court deals,

in its customs jurisdiction arise "under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"—within the terms of Article III, Section 2. The various customs statutes and regulations, as well as the foreign treaties bearing on customs problems—the substantive law applied by the court—are exclusively federal. The *Bakelite* opinion did not intimate any other view, and the rationale of the opinions in *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, confirms it (see, *e.g.*, 337 U.S. at 610, 611–615, 641–2 (fn. 20–21), 643, 649, 652).[20]

(2). "*Controversies to which the United States shall be a Party*". The cases within the original jurisdiction of the Court of Customs Appeals also fall under a second of the categories of cases and controversies defined in the second section of Article III, *viz.*, "Controversies to which the United States shall be a Party." See Brown, *The Rent in Our Judicial Armor*, 10 Geo.

[20] We add that, for the reasons given in the text, the jurisdiction of the Court of Claims, as well as of the District Courts under the Tucker Act and Federal Tort Claims Act, likewise rests on the clause of Article III, Section 2, relating to cases arising under the Constitution and laws of the United States, as well as the subsequent clause relating to controversies to which the United States is a party (discussed *infra*, pp. 114–114). Such cases all have a federal genesis and their subject matter is always federal in origin. Accordingly, they fall within the constitutional category of cases "arising under this Constitution, the Laws of the United States; * * *." See the discussion to this effect in the opinions of Mr. Chief Justice Vinson, Mr. Justice Frankfurter, and Mr. Justice Rutledge in *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 610, 640–2 (fns. 20–21), 649, 652. See also *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 455.

Wash. L. Rev. 127, 136 (1941). In the proceedings before the Board of General Appraisers, the United States was the party defendant.[1] In the Court of Customs Appeals, the United States was appellant or appellee, depending on which way the decision of the Board of General Appraisers went. In *Williams* v. *United States*, 289 U.S. 553, 571–580, this Court construed the phrase "Controversies to which the United States shall be a Party" as embracing only controversies to which the United States is a party *plaintiff*. (In so doing, it found it necessary to overrule prior statements that, though the United States could "not be sued without its consent yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy." *Minnesota* v. *Hitchcock*, 185 U.S. 373, 386; see also *Kansas* v. *United States*, 204 U.S. 331, 342.) In *Pope* v. *United States*, 323 U.S. 1, the government urged that the interpretation placed upon the constitutional phrase by the *Williams* case was the consequence of "faulty analysis and the failure of the Court to have the pertinent constitutional history before it." Brief for the United States, No. 26, Oct. Term, 1944, p. 87. The historical materials bearing upon the intent of the framers were examined in detail. *Id.*, pp. 86–101.[2] We adhere to that position, and summarize it immediately below.

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[1] Its consent to be sued was given by the Customs Administrative Act of 1890, c. 407, § 14, 26 Stat. 131, 137; and see the same section of that Act as amended by the Payne-Aldrich Act of 1909, c. 6, § 28, 36 Stat. 11, 91, 100; see also Appendix B, *infra*, pp. 137–138.

[2] The Court found it unnecessary to reach the question. 323 U.S. at 13.

For the full-scale argument, the Court is respectfully referred to the government's brief in the *Pope* case.

The conclusion of the *Williams* case, concededly contrary to the literal meaning of the constitutional language ("Controversies to which the United States shall be a Party"), was based upon an historical analysis designed to show that the immunity of the sovereign from suit precluded the application of the phrase to suits *against* the government. More complete historical research has shown no intention to withhold from the federal courts jurisdiction over claims against the government. The flaw in the reasoning in the *Williams* case is the failure to distinguish the bestowal of judicial power from the waiver of sovereign immunity. The premise that Article III is not a consent to suit is correct; but it does not follow that, where such consent has been given, a suit against the government is not a "Controversy] to which the United States shall be a Party." While sovereign immunity was well known at the time of the framing of the Constitution, it was equally known that such immunity could be, and had been, waived both in England and here. Virginia, Delaware, Maryland, Georgia, North Carolina, Connecticut, and New Jersey had all submitted to judicial determination controversies involving the government. Hamilton, in *The Federalist*, No. 81, specifically recognized that a sovereign may be sued if it consents. See *Principality of Monaco* v. *Mississippi*, 292 U.S. 313, 324. Moreover, it is significant that, in the Virginia debates on the Constitution, both Madison and Marshall expressly acknowledged that, if a state con-

sents to be sued by a foreign nation, Article III would authorize jurisdiction in the federal courts over such a suit, by virtue of the clause in Section 2 extending the federal judicial power to controversies "between a State * * * and foreign States * * *". See *Principality of Mônaco* v. *Mississippi*, 292 U.S. 313, 323–324. There is no reason to believe that the parallel clause providing jurisdiction where the United States is a party had a narrower scope. The framers would not have granted the federal courts jurisdiction of suits against sovereign states (if they consented to be sued) but at the same time deprived the federal courts of jurisdiction against the United States (if it consented to be sued).[73] And the historical fact is that, less than three years after the adoption of the Constitution, the Justices of this Court assumed that the inferior courts of the United States could act on claims against the government if the judicial action were made final and placed beyond executive or legislative revision (*Hayburn's Case*, 2 Dall. 409; see *United States* v. *Ferreira*, 13 How. 40).[74]

(*b*). *The subsequent vesting in the court of jurisdiction over matters which may not constitute "cases"*

[73] The scope and meaning of the clause extending federal judicial power to "Controversies to which the United States shall be a Party" is discussed to some extent in the opinions of Mr. Chief Justice Vinson and Mr. Justice Rutledge in *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 610, 640–2 (fns. 20–21).

[74] It goes without saying that, if the customs jurisdiction of the Court of Customs and Patent Appeals can rest on the "United States" clause of Article III, Section 2, the same is true of the jurisdiction of the Court of Claims and the Customs Court.

within Article III, Section 2, did not affect its Article III status.

(*1*). It was not until 1922, thirteen years after its creation, that the Court of Customs Appeals was first vested with jurisdiction over a matter which may not have involved the adjudication of a case or controversy within the scope of Article III, Section 2. This was the power, conferred by Section 316 of the Tariff Act of 1922, 42 Stat. 943, to hear appeals from findings of the Tariff Commission (on questions of law only) in proceedings relating to unfair practices in the import trade. *Supra*, pp. 91, 98–102. Whether such an appeal presented a case or controversy was the issue on the merits in the *Bakelite* case, 279 U.S. 438, which this Court found it unnecessary to determine in view of its ruling that the Court of Customs Appeals was a legislative tribunal and, as such, could lawfully be vested with power to hear matters other than cases or controversies. *Supra*, pp. 98–102. The Court of Customs Appeals, it will be recalled, had determined that such an appeal *did* present a case or controversy. *In re Frischer & Co.*, 16 Ct. Cust. App. 191, 203–214 (1928); see *supra*, p. 100.[75]

Regardless, however, of whether these appeals from the Tariff Commission present justiciable cases within the sense of Article III,[76] the conferring of such juris-

[75] See, however, fn. 62, *supra* pp. 98–99, 2d par., where it is noted that the Senate Finance Committee, in 1929, was of the view that an appeal from the Tariff Commission's findings did not present a case or controversy.

[76] This aspect of the court's jurisdiction has constituted a very minor part of its total business. See Brown, *The Rent*

diction could not have affected the Article III character and status of the court if, as we have argued, it had that status previously. If the court was created as an Article III tribunal, the attempted vesting by Congress of inconsistent powers could not have altered its character. At most, the attempt to grant such authority would have been ineffectual, as the petitioner in *Ex parte Bakelite* had argued to this Court (*supra*, pp. 99–100).[77] See *Pope* v. *United States*, 323 U.S. 1, 13. But for the reasons discussed below, at pp. 121–125, we do not believe that the vesting of this additional jurisdiction—even assuming its non-justiciable character—was inconsistent with the court's Article III status.

(*2*). In 1929, the patent and trade-mark jurisdiction of the Court of Appeals of the District of Columbia was transferred to the Court of Customs Appeals and the name of the court was changed to the Court of Customs and Patent Appeals. *Supra*, pp. 91–92. This category constitutes the second of the two major classes of jurisdiction currently exercised by the court.

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in Our Judicial Armor, 10 Geo. Wash. L. Rev. 127, 135 (1941). Only five such cases have been before the court in its history: *In re Frischer & Co.*, 16 Ct. Cust. App. 191 (1928) (see also *Frischer & Co.* v. *United States*, 17 C.C.P.A. 494 (1930) (the same case, on the merits, following the *Bakelite* decision)); *In re Orion Co.*, 22 C.C.P.A. 149, 71 F. 2d 458 (1934); *In re Northern Pigment Co.*, 22 C.C.P.A. 166, 71 F. 2d 447 (1934); *In re Amtorg Corp.*, 22 C.C.P.A. 558, 75 F. 2d 826 (1935); *In re Von Clemm*, 43 C.C.P.A. (Customs) 56, 229 F. 2d 441 (1956).

[77] Similarly, in the case of the Court of Claims, if (as we have suggested, *supra*, pp. 67 ff, 102–106, 107 (fn. 68), 108–116) that tribunal was established as a constitutional court (and *Williams* v. *United States*, 289 U.S. 553, was wrongly decided), and if it be thought that a constitutional court cannot have advisory

In *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, decided two years prior to this transfer, this Court held that the patent and trade-mark powers of the District of Columbia Court of Appeals involved the rendering of "mere administrative decision[s]"—in the nature of "instruction[s] to the Commissioner of Patents"—by "a court which is made part of the machinery of the Patent Office for administrative purposes," with the consequence that the court's decisions were not "judicial judgments" within the meaning of Article III, Section 2. 272 U.S. at 698-699. "Neither the opinion nor decision of the Court of Appeals under § 4914 R.S. [patents], or § 9 of the Act of 1905 [Act of February 20, 1905, c. 592, 33 Stat. 727, assimilating the rules governing trade-mark appeals to those obtaining in patent appeals]," the Court said (272 U.S. at 699)—

> precludes any person interested from having the right to contest the validity of such patent or trade-mark in any court where it may be called in question. This result prevents an appeal to this Court, which can only review judicial judgments. * * *[78]

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functions like the congressional reference jurisdiction of the Court of Claims, then it would follow that the congressional reference jurisdiction (which was added in the 1880's) was invalidly conferred—not that the Court of Claims was a legislative court. We suggest below (fn. 85, *infra*, p. 125) that the judges of the Court of Claims may be acting as commissioners in reporting to Congress in legislative reference cases.

[78] This Court did not question the power of the District of Columbia Court of Appeals to hear such cases, but stated that it derived its authority in this respect from Article I of the Constitution rather than Article III. 272 U.S. at 700. The opinion referred to the power of Congress under Article I, Section 8, clause 17 (giving Congress the exclusive authority to

The Court did not mention in the *Postum Cereal* opinion an earlier decision, *United States* v. *Duell*, 172 U.S. 576, 586–589 (decided at a time when the legislation with respect to patent and trade-mark appeals differed in no material respect from that in effect at the time of the *Postum Cereal* ruling [79]), in which Chief Justice [redacted], for a unanimous Court, stressed the essentially judicial nature of the process of issuing patents and settling controversies in patent interference proceedings and the binding effect of the Court of Appeals' decision on the Patent Office in such proceedings.[80] In particular, the *Duell* opinion noted that the court's decision was "none the less a judgment" because its effect was to aid an administrative body in the performance of duties imposed upon it by Congress. 172 U.S. at 588. See also the later patent law decision in *Hoover Company* v. *Coe*, 325 U.S. 79; and such rulings as *Perkins* v. *Elg*, 307 U.S. 325, and *McGrath* v. *Kristensen*, 340 U.S. 162 (cases in which courts have given rulings on legal issues, binding on administrative officials but not necessarily govern the District of Columbia) to clothe the courts of the District with administrative and legislative as well as judicial functions. See *infra*, pp. 121–125.

[79] The provision of Rev. Stats. § 4914 declaring that no decision of the court in a patent appeal case would preclude any person from the right to contest the validity of any patent that might be issued as a consequence of such appeal in any court in which the same might be called in question—referred to by the Court in the *Postum Cereal* case (*supra*, p. 117)—was in effect at the time of the *Duell* decision, and was referred to in a passage of an earlier opinion (*Butterworth* v. *Hoe*, 112 U.S. 50, 60) which the *Duell* opinion quoted. 172 U.S. at 587.

[80] See Rev. Stats. § 4914, providing that the decision of the court "shall govern the further proceedings in the case." This provision was in effect when the *Postum Cereal* case was decided, and is still the law. 35 U.S.C. 144.

controlling their ultimate action). See also the federal extradition procedure under which the judge certifies his conclusions to the Secretary of State but the latter is not bound to extradite as a result of the judicial certification. 18 U.S.C. 3184, 3186.

In addition, it should be noted that, under the law in effect at the time of the *Postum Cereal* decision, if an application for a patent was refused, either by the Commissioner of Patents or by the Court of Appeals of the District of Columbia upon appeal from the commissioner, the applicant might seek to have his right to a patent adjudicated by a bill in equity. Rev. Stats., § 4915 (35 U.S.C. [1926 ed.] 63). Two months following the *Postum Cereal* decision, the law was amended so as to compel an unsuccessful applicant in the Patent Office to elect between his right of appeal to the District of Columbia Court of Appeals and his remedy in equity. Act of March 2, 1927, c. 273, § 8, 44 Stat. (Part 2) 1336 (35 U.S.C., Compact Ed., [1928 Supp. to 1926 ed.] 59a). If a party to a patent interference proceeding was dissatisfied with the decision of the Patent Office board of appeals and appealed to the District Court of Appeals, an adverse party might, under the amendment, notify the Commissioner of Patents that he elected to have all further proceedings conducted under Rev. Stats. § 4915, in which event the appeal to the Court of Appeals was to be dismissed. *Ibid.*[31] These provi-

[31] The Senate Committee on Patents, in reporting out the bill effecting these amendments, explained that, under then-existing law, "an applicant whose case has been rejected or a losing party in an interference may appeal to the Court of Appeals of the District of Columbia and then if he is dissatisfied he may start proceedings de novo by filing a bill in equity in a United

sions were in effect at the time of the transfer of the patent and trade-mark jurisdiction to the Court of Customs Appeals, and remain in effect at the present time. 35 U.S.C. 141, 145, 146.

Moreover, the fact that the decision of the District of Columbia Court of Appeals did not preclude any interested person from contesting the validity of the patent or trade-mark (if one was granted) in any court in which it might be called in question—the reason assigned in the *Postum Cereal* opinion for the non-judicial character of the Court of Appeals' decision—would not appear to be a sound basis for that conclusion. The right to contest the validity of a patent or trade-mark existed even if the patent or trade-mark was issued pursuant to the procedure by bill in equity, which Rev. Stats. § 4915 (35 U.S.C. [1926 ed.] 63; now 35 U.S.C. 145) made available to an unsuccessful applicant as an alternative to his remedy by appeal to the District Court of Appeals (see *supra*, pp. 119–120). See Reviser's Note 35 U.S.C. 144. The latter section is the modern counterpart of Rev. Stats. § 4914, the provision of the former law which contained the "non-preclusion" clause. That clause has been omitted from 35 U.S.C. 144 "as superfluous" because, the Reviser's Note explains, "such a sentence does not appear in the present civil action [the present name

States district court, under section 4915 [of the Revised Statutes], and from the decision of that court he may appeal to the court of appeals. This procedure makes for very vexatious delays and the object of the present bill is to permit one to have the decision of the Patent Office reviewed either by the court of appeals or by filing a bill in equity, but not both." S. Rept. 1313, 69th Cong., 2d sess., p. 4, to accompany S. 4812. See also, to the same effect, H. Rept. 1889, 69th Cong., 2d sess., pp. 2–3 to accompany H.R. 13487, a similar bill.

for the former remedy by bill in equity] section, 35 U.S.C. 63 [now 35 U.S.C. 145] and in either case the validity of the patent may be questioned." Since the remedy by bill in equity was unquestionably judicial (see *Hoover Co.* v. *Coe*, 325 U.S. 79), notwithstanding that a patent issued under that procedure might later be challenged in any court, the mere fact that a patent issued pursuant to the alternative procedure of appeal to the Court of Appeals could later be challenged would not appear to constitute a basis, in itself, for holding the appeal procedure non-judicial. Cf. *Hoover Co.* v. *Coe*, *supra*.

(3). Even if one accepts the *Postum Cereal* decision as having settled the non-Article III character of the patent and trade-mark jurisdiction of the Court of Customs and Patent Appeals, the transfer to it of that jurisdiction was not inconsistent with its Article III status.

O'Donoghue v. *United States*, 289 U.S. 516, indicates that the possession by a federal court of some powers and functions not strictly judicial in character is compatible with its status as a tribunal ordained and established under Article III. 289 U.S. at 545–548, 550–551. The *O'Donoghue* case held that the superior courts of the District of Columbia were established by Congress pursuant to its court-creating authority under Article III, with the consequence that the judges of those courts enjoy the immunity guaranteed by that article against diminution of their compensation during their continuance in office. 289 U.S. at 551. At the same time, the Court recognized the authority of Congress, acting under its plenary power to legislate for the District of Columbia (Art.

I, § 8, clause 17), to vest in the courts of the District, in addition to their Article III judicial functions, administrative and even legislative powers,[82] which could not have had their source in Article III. 289 U.S. at 545–548, 550–551.

We submit that the rationale of the *O'Donoghue* case is also applicable to the Court of Customs and Patent Appeals with respect to its patent and trade-mark jurisdiction.[83] For one thing, that court, like the courts of the District, is located at the seat of government, within the area over which Congress possesses exclusive power to legislate. Congress can, pursuant to the same authority which it exercises in conferring non-judicial powers on the ordinary courts of the District, constitutionally vest similar powers in the Court of Customs and Patent Appeals, as if that court were for these purposes a superior court of the District. This is by no means a far-fetched concept, since the patent and trade-mark jurisdiction did actually come from the Court of Appeals for the District (*supra*, pp. 91–92, 116–121). There would appear to be no constitutional objection to carving out

[82] *See, e.g., Keller* v. *Potomac Electric Co.*, 261 U.S. 428, 440–443 (rate making); *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693, 698–701 (patent and trade-mark appeals); *Federal Radio Commission* v. *General Electric Co.*, 281 U.S. 464, 467–468 (radio station licensing; cf. *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U.S. 266, 274–278); see also D.C. Code, § 31-101 (authorizing District Court judges to appoint members of the Board of Education).

[83] It would also be applicable—assuming the non-judicial character of the court's appellate function in proceedings before the Tariff Commission relating to unfair competitive practices (see *supra*, pp. 115–116)—to that phase of its jurisdiction.

part of the accepted jurisdiction of the District Court of Appeals and assigning it to another such constitutional court. Congress has limited neither the judicial nor the non-judicial functions of the Court of Appeals to local matters related to the District, and this Court has never intimated that the non-judicial functions of that court must be confined to District matters. The authority of Article I, Section 8, clause 17, has been held sufficient basis for imposing general federal functions, non-judicial in character, on the Court of Appeals. It should suffice, too, for another appellate court within the District. It is true that the Court of Customs and Patent Appeals is national in scope and not limited by statute to sitting in Washington (28 U.S.C. 214), although the District is the official station of the judges (28 U.S.C. 456). But the congressional power relating to the District of Columbia is also national in scope and may be exercised beyond the confines of the District. See *Cohens* v. *Virginia*, 6 Wheat. 264, 424, 425, 428–9; *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 600–602 (opinion of Jackson, J.).

Furthermore, we suggest that Congress may properly draw upon its other Article I powers in adding non-judicial functions to the Court of Customs and Patent Appeals. The patent, commerce, and customs duties clauses of Article I, Section 8 (clauses 1, 3, and 8)—granting authority to legislate generally in the field of patents, trade-marks, and customs—sustain the establishment of such non-judicial machinery. The problem is, of course, the joinder of these functions with the court's judicial responsibilities stemming from Article III. In the past, this Court

and individual Justices have rejected, in general terms, the exercise by federal constitutional courts, other than the District of Columbia courts, of non-judicial functions. See, *e.g.*, *Ex parte Bakelite*, 279 U.S. 438, 454; *O'Donoghue* v. *United States*, 289 U.S. 516, 546–7, 551; *Williams* v. *United States*, 289 U.S. 553, 569; *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582. Theoretically it is difficult to distinguish, in this connection, the District of Columbia power in Article I, Section 8, from the other heads of legislative authority in Article I. But the Court's concern for the nationwide federal court system prompts the thought that there well may be a difference, with respect to joinder of non-judicial functions, between this Court and the regular federal courts in the states, on the one hand, and special constitutional courts established for special purposes, on the other. The reasons impelling the Court to protect the regular federal courts against non-judicial encroachment[34]—mainly the fear of unloosing upon those courts a mass of duties foreign to their role as judges—apply with less force to the specialized tribunals with their limited functions and areas of responsibility (particularly the specialized courts determining issues between citizens and their government). The analogy of the District of Columbia courts indicates that, so long as these specialized courts are primarily endowed with judicial power under Article III, the addition of certain non-judicial functions is valid and does not destroy the Article III character of the court. Many

[34] See, *e.g.*, *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 590–1, 616, 628–9, 648–9.

so-called "administrative" functions, like the patent and trade-mark duties of the Court of Customs and Patent Appeals, are close kin to normal judicial responsibilities (see *supra*, pp. 116–124)—separated by, at most, a thin line. See, particularly, *Hoover Co.* v. *Coe*, 325 U.S. 79, 83–84, 87–88. It seems an unduly rigid interpretation of the Constitution to hold that Congress cannot combine in a particular tribunal, designed for a special field, both Article III powers and decision-making non-judicial functions of this kind, but must instead create a totally separate body for the non-judicial or non-Article III responsibilities. Properly applied, the principle of the separation of powers does not compel that result.

There is some authority for the proposition that even judges of the regular federal courts may act non-judicially in a voluntary capacity analogous to that of a commissioner. In *Hayburn's Case*, 2 Dall. 409, the three circuit courts expressed their opinion that the determinations which Congress had asked them to make of pension claims against the Government, subject to review by the Secretary of War, did not involve the judicial power of the United States which they were capable of exercising. The Circuit Court for the District of New York, consisting of Chief Justice Jay, Associate Justice Cushing, and District Judge Duane, was of the opinion, however, that the individual judges of the circuit court were capable of performing those functions as "commissioners" and not as a court. Subsequently the judges of some district courts did act in such capacity. See *United States* v. *Ferreira*, 13 How. 40; see also the note concerning the unreported 1794 case, *of United States* v. *Yale Todd*, appended to the report of the *Ferreira* case (p. 51). The judges of the Court of Claims have said that they assume the performance of like advisory functions at the request of Congress, sitting as commissioners and not as a court. See *Seaborn* v. *United States*, 27 C. Cls. 485, 490; mandamus to permit appeal denied, *In re Seaborn*, 148 U.S. 232. Cf. *Zadik* v. *United States*, 124 C. Cls. 650.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed or, in the alternative, since petitioner must lose on the merits even if the court erred in denying leave to appeal, that the judgment of conviction should be affirmed.[38]

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[38] See *Pollard* v. *United States*, 352 U. S. 354, 363.

APPENDIX A

Statutes Involved

28 U.S.C. 1915:

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a citizen who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

(e) Judgment may be rendered for costs at the conclusion of the suit or action as in other

cases, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

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28 U.S.C. 211:

The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record known as the United States Court of Customs and Patent Appeals. Such court is hereby declared to be a court established under article III of the Constitution of the United States.

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28 U.S.C. 294:

(a) Any retired Chief Justice of the United States or Associate Justice of the Supreme Court may be designated and assigned by the Chief Justice of the United States to perform such judicial duties in any circuit, including those of a circuit justice, as he is willing to undertake.

(b) Any judge of the United States who has retired from regular active service under section 371(b) or 372(a) of this title shall be known and designated as a senior judge and may continue to perform such judicial duties as he is willing and able to undertake, when designated and assigned as provided in subsections (c) and (d).

(c) Any retired circuit or district judge may be designated and assigned by the chief judge or judicial council of his circuit to perform such judicial duties within the circuit as he is willing and able to undertake. Any other retired judge of the United States may be designated and assigned by the chief judge of his

court to perform such judicial duties in such court as he is willing and able to undertake.

(d) The Chief Justice of the United States shall maintain a roster of retired judges of the United States who are willing and able to undertake special judicial duties from time to time outside their own circuit, in the case of a retired circuit or district judge, or in a court other than their own, in the case of other retired judges, which roster shall be known as the roster of senior judges. Any such retired judge of the United States may be designated and assigned by the Chief Justice to perform such judicial duties as he is willing and able to undertake in a court outside his own circuit, in the case of a retired circuit or district judge, or in a court other than his own, in the case of any other retired judge of the United States. Such designation and assignment to a court of appeals or district court shall be made upon the presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises and to any other court of the United States upon the presentation of a certificate of necessity by the chief judge of such court. No such designation or assignment shall be made to the Supreme Court.

(e) No retired justice or judge shall perform judicial duties except when designated and assigned.

The Payne-Aldrich Tariff Act of August 5, 1909, c. 6, § 28, 36 Stat. 11, 91, 105–108, amended the Customs Administration Act of June 10, 1890, c. 407, 26 Stat. 131, and added a new section, 29, which provided (36 Stat. 105–108):

SEC. 29. That a United States Court of Customs Appeals is hereby created, and said court shall consist of a presiding judge and four associate judges appointed by the President,

by and with the advice and consent of the Senate, each of whom shall receive a salary of ten thousand dollars per annum. It shall be a court of record, with jurisdiction as hereinafter established and limited.

[2d par.] Said court shall prescribe the form and style of its seal and the form of its writs and other process and procedure and exercise such powers conferred by law as may be conformable and necessary to the exercise of its jurisdiction. It shall have the services of a marshal, with the same duties and powers, under the regulations of the court, as are now provided for the marshal of the Supreme Court of the United States, so far as the same may be applicable. Said services within the District of Columbia shall be performed by a marshal at a salary of three thousand dollars per annum, to be appointed by and hold office during the pleasure of said court; said services outside the District of Columbia to be performed by the United States marshals in and for the districts where sessions of said court may be held, and to this end said marshals shall be the marshals of said Court of Customs Appeals. The court shall appoint a clerk, whose office shall be in the city of Washington, District of Columbia, and who shall perform and exercise the same duties and powers in regard to all matters within the jurisdiction of said court as are now exercised and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable. The salary of the clerk shall be four thousand dollars per annum, which sum shall be in full payment for all service rendered by such clerk, and all fees of any kind whatever, and all costs shall be by him turned into the United States Treasury. Said clerk shall not be appointed by the court or any judge thereof as a commissioner, master, receiver, or referee. The costs and fees in the said court shall be fixed and established by said

court in a table of fees to be adopted and approved by the Supreme Court of the United States within four months after the organization of said court: *Provided,* That the costs and fees so fixed shall not, with respect to any item, exceed the costs and fees charged in the Supreme Court of the United States; and the same shall be expended, accounted for, and paid over to the Treasury of the United States. The court shall have power to establish all rules and regulations for the conduct of the business of the court and as may be needful for the uniformity of decisions within its jurisdiction as conferred by law.

[3d par.] The said Court of Customs Appeals shall always be open for the transaction of business, and sessions thereof may, in the discretion of the court, be held by the said court, in the several judicial circuits, and at such places as said court may from time to time designate.

[4th par.] The presiding judge of said court shall be so designated in [the] order of appointment and in the commission issued him by the President, and the associate judges shall have precedence according to the date of their commissions. Any three of the members of said court shall constitute a quorum, and the concurrence of three members of said court shall be necessary to any decision thereof.

[5th par.] The said court shall organize and open for the transaction of business in the city of Washington, District of Columbia, within ninety days after the judges, or a majority of them, shall have qualified.

[6th par.] After the organization of said court no appeal shall be taken or allowed from any Board of United States General Appraisers to any other court, and no appellate jurisdiction shall thereafter be exercised or allowed by any other courts in cases decided by said Board of United States General Appraisers; but all

appeals allowed by law from such Board of General Appraisers shall be subject to review only in the Court of Customs Appeals hereby established, according to the provisions of this Act: *Provided,* That nothing in this Act shall be deemed to deprive the Supreme Court of the United States of jurisdiction to hear and determine all customs cases which have heretofore been certified to said court from the United States circuit courts of appeals on applications for writs of certiorari or otherwise, nor to review by writ of certiorari any customs case heretofore decided or now pending and hereafter decided by any circuit court of appeals, provided application for said writ be made within six months after the passage of this Act: *And provided further,* That all customs cases heretofore decided by a circuit or district court of the United States or a court of a Territory of the United States and which have not been removed from said courts by appeal or writ of error, and all such cases heretofore submitted for decision in said courts and remaining undecided may be reviewed on appeal at the instance of either party by the United States Court of Customs Appeals, provided such appeal be taken within one year from the date of the entry of the order, judgment or decree sought to be reviewed.

[7th par.] The Court of Customs Appeals established by this Act shall exercise exclusive appellate jurisdiction to review by appeal, as provided by this Act, final decisions by a Board of General Appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classification, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs

revenues; and the judgment or decrees of said Court of Customs Appeals shall be final in all such cases.

[8th par.] Any judge who, in pursuance of the provisions of this Act, shall attend a session of the Court of Customs Appeals held at any place other than the city of Washington, District of Columbia, shall be paid, upon his written and itemized certificate, by the marshal of the district in which the court shall be held, his actual and necessary expenses incurred for travel and attendance, and the actual and necessary expenses of one stenographic clerk who may accompany him, and such payments shall be allowed the marshal in the statement of his accounts with the United States.

[9th par.] The marshal of said court for the District of Columbia and the marshals of the several districts in which said Court of Customs Appeals may be held shall, under the direction of the Attorney-General of the United States and with his approval, provide such rooms in the public buildings of the United States as may be necessary for said court: *Provided, however,* That in case proper rooms can not be provided in such buildings, then the said marshals, with the approval of the Attorney-General of the United States, may, from time to time, lease such rooms as may be necessary for said court. The bailiffs and messengers of said court shall be allowed the same compensation for their respective services as are allowed for similar services in the existing circuit courts; and in no case shall said marshals secure other rooms than those regularly occupied by existing circuit courts of appeals, circuit courts, or district courts, or other public officers, except where such can not, by reason of actual occupancy or use, be occupied or used by said Court of Customs Appeals.

[10th par.] If the importer, owner, consignee, or agent of any imported merchandise,

or the collector or Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, or with any other appealable decision of said board, they, or either of them, may, within sixty days next after the entry of such decree or judgment, and not afterwards, apply to the Court of Customs Appeals for a review of the questions of law and fact involved in such decision: *Provided*, That in Alaska and in the insular and other outside possessions of the United States ninety days shall be allowed for making such application to the Court of Customs Appeals. Such application shall be made by filing in the office of the clerk of said court a concise statement of errors of law and fact complained of, and a copy of said statement shall be served on the collector, or on the importer, owner, consignee, or agent, as the case may be. Thereupon the court shall immediately order the Board of General Appraisers to transmit to said court the record and evidence taken by them, together with the certified statement of the facts involved in the case and their decision thereon; and all the evidence taken by and before said board shall be competent evidence before said Court of Customs Appeals. The decision of said Court of Customs Appeals shall be final, and such cause shall be remanded to said Board of General Appraisers for further proceedings to be taken in pursuance of such determination.

[11th par.] Immediately upon the organization of the Court of Customs Appeals all cases within the jurisdiction of that court pending and not submitted for decision in any of the United States circuit courts of appeals, United States circuit, territorial or district courts, shall, with the record and samples therein, be

certified by said courts to said Court of Customs Appeals for further proceedings in accordance herewith: *Provided*, That where orders for the taking of further testimony before a referee have been made in any of such cases, the taking of such testimony shall be completed before such certification.

[12th par.] That in case of a vacancy or the temporary inability or disqualification for any reason of one or two judges of said Court of Customs Appeals, the President of the United States, may, upon the request of the presiding judge of said court, designate any qualified United States circuit or district judge or judges to act in his or their place, and such United States judge or judges shall be duly qualified to so act.

[13th par.] Said Court of Customs Appeals shall have power to review any decision or matter within its jurisdiction and may affirm, modify, or reverse the same and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly.

[14th par.] Immediately upon receipt of any record transmitted to said court for determination the clerk thereof shall place the same upon the calendar for hearing and submission; and such calendars shall be called and all cases thereupon submitted, except for good cause shown, at least once every sixty days.

[15th par.] In addition to the clerk of said court the court may appoint an assistant clerk at a salary of two thousand five hundred dollars per annum, five stenographic clerks at a salary of two thousand four hundred dollars per annum each, and one stenographic reporter at a salary of two thousand five hundred dollars per annum, and a messenger at a salary of nine hundred dollars per annum, all payable in equal monthly installments, and all of whom, including the clerk, shall hold office during the

pleasure of and perform such duties as are assigned them by the court. Said reporter shall prepare and transmit to the Secretary of the Treasury once a week in time for publication in the Treasury Decisions copies of all decisions rendered to that date by said court, and prepare and transmit, under the direction of said court, at least once a year, reports of said decisions rendered to that date, constituting a volume, which shall be printed by the Treasury Department in such numbers and distributed or sold in such manner as the Secretary of the Treasury shall direct. The marshal of said court for the District of Columbia is hereby authorized to purchase, under the direction of the presiding judge, such books, periodicals, and stationery as may be necessary for the use of said court, and such expenditures shall be allowed and paid by the Secretary of the Treasury upon claim duly made and approved by said presiding judge.

APPENDIX B

Creation and History of the Board of General Appraisers (Now the United States Customs Court)

The Board of General Appraisers, the predecessor of the present United States Customs Court, was created by Section 12 of the Customs Administration Act of June 10, 1890, c. 407, 26 Stat. 131, 136. As amended by the Payne-Aldrich Tariff Act of August 5, 1909, c. 6, § 28, 36 Stat. 11, 91, 98–99 (the Act which created the Court of Customs Appeals), Section 12 provided for the appointment by the President, by and with the advice and consent of the Senate, of nine "general appraisers of merchandise", at salaries of $9,000 per annum. The Board sat at times as a board of nine, at times in panels of three members each (denominated Board 1, Board 2, and Board 3), and at times through its individual members. The President had authority to designate one member of the Board as "president" of the Board, and others to act in his absence. The Board had power to establish rules of evidence, practice, and procedure for the conduct of its business, and it (and each member) had "all the powers of a circuit court of the United States" in preserving order, compelling the attendance of witnesses and the production of evidence, and punishing for contempt. *Ibid.* (36 Stat. 98–99).

The Board's principal function was to hear and determine appeals by importers from decisions of the collectors of customs as to the "rate and amount of duties chargeable upon imported merchandise, includ-

ing all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage)." § 14, as amended, 36 Stat. 100. The Board's decisions in these so-called "classification" cases were "final and conclusive upon all persons interested therein", subject only to appeal to the Court of Customs Appeals. *Ibid.* In addition, the Board heard and determined appeals by importers or the collectors of customs from decisions of "appraisers" (executive officials stationed at the several ports) as to the value of imported goods. § 13, as amended, 36 Stat. 99–100. In these so-called "reappraisement" cases, the decision of the Board was absolutely final ("* * * shall not be subject to review in any manner for any cause in any tribunal or court * * *"). *Ibid.*[1]

Members of the Board held office "during good behavior," subject, however, to removal by the President, "after due hearing", "for the following causes, and no other: Neglect of duty, malfeasance in office, or inefficiency." § 12, as amended, 36 Stat. 98. (As originally established in 1890, members of the Board were removable by the President "at any time" for any of the three stated causes. § 12, 26 Stat. 136.[2]

[1] In 1930, appeals (to the Court of Customs and Patent Appeals) from decisions of the Customs Court (the successor of the Board of General Appraisers) in reappraisement cases, on "questions of law only", were authorized for the first time. Tariff Act of June 17, 1930, c. 497, § 501, 46 Stat. 590, 730. See 28 U.S.C. 2637.

[2] In addition, under the original Act of 1890, members of the Board were authorized to exercise (in addition to their judicial functions in reappraisement and classification cases) such supervisory functions over appraisements and classifications, "under the general direction of the Secretary of the Treasury", as might be needful to secure lawful and uniform appraisements and classifications at the several ports. § 12, 26 Stat. 136. The latter provision (among others) was elimi-

The Act of May 27, 1908, c. 205, § 3, 35 Stat. 403, 406, amended the 1890 Act so as to provide that all members of the Board (those theretofore and those thereafter appointed) should serve "during good behavior," retaining, however, the President's power of removal for any of the three stated causes, but adding the requirement that removal be only "after due hearing." [1]

In 1926, the name of the Board was changed to the "United States Customs Court," and the titles of its members to the "chief justice" and "associate justices," without, however, any change in its powers, duties, or membership. Act of May 28, 1926, c. 411, 44 Stat. (Part 2) 669. The legislative history of this Act indicates that its purpose was to make the Board, which had repeatedly been held by the courts to be essentially a judicial tribunal,[2] a court in name as well

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[1] nated from Section 12 by the amendatory Act of 1906, 34 Stat. 98–99.

[2] The Board's "powers of a circuit court" in preserving order, compelling the attendance of witnesses and the production of evidence, and punishing for contempt (see *supra*, p. 137) were also first conferred by the 1908 Act (§ 3, 35 Stat. 406). Previously, the Board's powers of compulsory process were more limited (penalty of $100 for failure to comply). § 17 of the 1890 Act, 26 Stat. 139.

[3] See *In re Van Blankensteyn*, 56 Fed. 171, 177 (C.A. 2, 1892); *Marine* v. *Lyon*, 65 Fed. 992, 994 (C.A. 1, 1895); *Stone* v. *Whitridge, White & Co.*, 129 Fed. 33, 36 (C.A. 1, 1904), reversed on other grounds *sub nom. United States* v. *Whitridge*, 197 U.S. 135; *United States* v. *Kurtz*, 5 Ct. Cust. App. 144, 146 (1914); *Atlantic Transport Co.* v. *United States*, 5 Ct. Cust. App. 373 (1914); *Yee Chong Yung & Co.* v. *United States*, 11 Ct. Cust. App. 382, 385 (1922); *Lewis & Conger* v. *United States*, 13 Ct. Cust. App. 22, 23–24 (1925); *United States* v. *McConnaughey & Co.*, 13 Ct. Cust. App. 112, 118 (1925); *United States* v. *Macy & Co.*, 13 Ct. Cust. App. 245, 248–249 (1925); *Johnson & Co.* v. *United States*, 13 Ct. Cust. App. 373, 377 (1926).

as in fact, in order to avoid confusion, particularly among foreign governments with which the Board had frequently to deal. See H. Rept. 184, 69th Cong., 1st sess., pp. 1–4, and S. Rept. 781, 69th Cong., 1st sess., pp. 1–2, on H.R. 7966; see also 67 Cong. Rec. 4796–4797.

In 1929, in a *dictum* in *Ex parte Bakelite Corporation*, 279 U.S. 438, 457–458, this Court said of the Customs Court:

> Formerly it was the Board of General Appraisers. Congress assumed to make the board a court by changing its name. There was no change in powers, duties or personnel. [Citing the Act of May 28, 1926, *supra*.] The board was an executive agency charged with the duty of reviewing acts of appraisers and collectors in appraising and classifying imports and in liquidating and collecting customs duties. [Footnote omitted.] But its functions, although mostly quasi-judicial, were all susceptible of performance by executive officers and had been performed by such officers in earlier times.

In 1930, the Customs Court was "continue[d] as now constituted" by Section 518 of the Tariff Act of June 17, 1930, c. 497, 46 Stat. 590, 737. The same section changed the names of the court's members to "judges" (from "justices"), fixed their salaries at $10,000,* and provided that they should hold office during good behavior (thus terminating the President's power of removal, see *supra*, pp. 138–139). The 1930 Act also effected various other changes relating to the powers and procedure of the court. *E.g.*, §§ 501–502, 509–511, 514–519, 46 Stat. 730–731, 733–734, 734–739.

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*The amount then being received by district court judges. Judicial Code, § 2, as amended by the Act of December 13, 1926, c. 6, § 1, 44 Stat. (Part 2) 919 (28 U.S.C. (1934 ed.) 5).

In 1940, the provisions of the 1930 Tariff Act continuing the court as then constituted were transferred to the Judicial Code, as Section 187(a). Act of October 10, 1940, c. 843, § 1, 54 Stat. 1101.

In 1956, as pointed out *supra*, pp. 67–68, 72, the court was declared by Congress to be a court established under Article III of the Constitution. Act of July 14, 1956, c. 589, § 1, 70 Stat. 532, amending Section 251 of Title 28 of the United States Code.

The currently applicable provisions pertaining to the constitution, jurisdiction, and procedure of the court are contained in 28 U.S.C. 251–255, 1581–1583, 2631–2642.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 669

BENNY LURK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR MARVIN JONES, CHIEF JUDGE OF THE UNITED STATES COURT OF CLAIMS, AND SAMUEL E. WHITAKER, J. WARREN MADDEN, DON N. LARAMORE AND JAMES R. DURFEE, JUDGES OF THE UNITED STATES COURT OF CLAIMS, AS AMICI CURIAE

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Interest of Amici Curiae

This brief is being filed pursuant to Rule 42 with the written consent of both petitioner and respondent. The Judges of the Court of Claims are not concerned with a

number of the issues raised by the parties and express no views about those issues. The Judges of the Court of Claims have a real interest, however, in the issues concerning the validity of the assignment of a retired judge of the Court of Customs and Patent Appeals to serve as a judge of the United States District Court for the District of Columbia. The resolution by this Court of those issues may well be virtually determinative with respect to similar issues concerning the status of the Court of Claims and of its member Judges.

The status of the Court of Claims as a constitutional court under Article III had appeared to be settled until *Ex Parte Bakelite Corporation*, 279 U. S. 438, 452-455, in the course of holding that the Court of Customs Appeals was a legislative court, expressed the view that the Court of Claims was a legislative court. This *dictum* in *Bakelite* was converted into a holding by *Williams v. United States*, 289 U. S. 553, 577, where it was pointed out that "neither by brief nor in argument here is any serious attempt made to differentiate, in respect of the question now being considered, between the Court of Claims and the Court of Customs Appeals; and we have been unable to discover any ground for such a differentiation."

One of the issues now before this Court concerns the validity and effect of a 1958 statute, 72 Stat. 848, 28 U.S.C. 211, as amended, which declares the United States Court of Customs and Patent Appeals "to be a court established under article III of the Constitution of the United States." Both petitioner and respondent, in their briefs, have noted that this statute was patterned after and had the same purpose as a 1953 statute, 67 Stat. 226, 28 U.S.C. § 171, as amended, which declares the United States Court of Claims "to be a court established under article III of the Constitution of the United States." The parties have relied in large measure upon the legislative history of the 1953

statute with respect to the Court of Claims as support for their respective contentions concerning the purpose and effect of the 1958 statute with respect to the Court of Customs and Patent Appeals.

That legislative history unmistakably reveals the purpose of the 1953 Act, as follows: "By Congress declaring unequivocally, as this bill proposes, that the Court of Claims was in fact established as, and continues to be, a constitutional court, this measure not only will protect the independence of the bench of the Court of Claims, but also will remove any doubt as to the power of Congress to authorize the Chief Justice of the United States to assign district and circuit judges to assist the judges of the Court of Claims whenever such action is considered necessary or expedient."[1] The bill which was enacted to accomplish this purpose was supported by the Judicial Conference of the United States,[2] and judges appointed to other courts, including retired Justices of this Court, have since been temporarily assigned to the Court of Claims, while judges of the Court of Claims have also been assigned to other courts.

A decision in this case, therefore, as to the validity of a temporary assignment of a judge of the Court of Customs and Patent Appeals to another court, and as to the status of the Court of Customs and Patent Appeals as a constitutional or legislative court, must necessarily be of the largest significance in the determination of similar issues with respect to the Court of Claims. Furthermore, we believe that this Court may be aided in deciding these issues with respect to the Court of Customs and Patent

[1] H. Rept. No. 695, 83d Cong., 1st Sess., 1953 U.S. Code Cong. and Adm. News 2006.

[2] Report of the Judicial Conference of the United States, September 22-24, 1949, p 19; H. Rept. No. 695, *supra*, 1953 U.S. Code Cong. and Adm. News 2006, 2013 2014.

Appeals by a more complete exploration of them in the context of the Court of Claims than is now before the Court. It is for this reason that the Judges of the Court of Claims have obtained the consent of the parties to appear as *amici curiae*.

We recognize that there are other issues in this case, and that it may be possible for this Court to dispose of the case without reaching the matters with which we are concerned. And, we are of course aware of the established practice of avoiding decision of broad constitutional issues where more limited non-constitutional grounds are available as a basis for decision. In the ordinary case, this is undoubtedly a salutary rule which comports with the administration of justice. We urge, however, the importance of a decision at this time by this Court of the issues concerning the status of the Court of Customs and Patent Appeals as a constitutional or legislative court and the validity of the assignment of a judge of that Court to another constitutional court.[3]

The provisions of the Constitution here concerned are not broad grants of power affecting the general operation of the Government. As observed by Mr. Justice Frankfurter, dissenting in *National Ins. Co. v. Tidewater Co.*, 337 U. S. 582, 654, "The very subject-matter of §§ 1 and 2 of Article III is technical in the esteemed sense of that term. These sections do not deal with generalities expanding with experience. Provisions for the organization of courts and their jurisdiction presuppose definiteness

[3] In the *Baltzly* case, this Court decided the issue concerning the status of the Court of Customs Appeals as a "constitutional" or legislative court in preference to an unresolved issue concerning the propriety of issuing a writ of prohibition as sought by the petitioner in that case, 279 U.S., at p. 448, and in the face of the unquantified statement by Attorney General Mitchell that the Court of Customs Appeals was a constitutional court, 279 U. S., at pp. 445-446.

and precision of phrasing." Those are not issues, there is necessarily desirable.

Furthermore, where, as here, the constitutional issues directly involve the proper administration of justice in its most narrow sense, a refusal promptly to decide such issues when the opportunity arises can hardly be in the interest of the administration of justice. "If there is one subject as to which this Court ought not to feel inhibited in passing on the validity of legislation by doubts of its own competence to judge what Congress has done, it is legislation affecting the jurisdiction of the federal courts." *National Ins. Co.* v. *Tidewater Co.*, *supra*, at p. 655 (dissenting opinion of Mr. Justice Frankfurter). We see no advantage that can be derived from further delay in deciding whether judges of the Court of Customs and Patent Appeals (and by inference of the Court of Claims) can be assigned to other constitutional courts. The continued existence of doubts about this practice can only impair the confidence of the public in our judicial system, and render suspect the validity of decisions made or participated in by assigned judges. If the existing practice is wrong, certainly it should be stopped as soon as possible. If it is entirely proper, as we believe, then much needless controversy will be avoided by making that clear in the decision of this case.

Summary of Argument

The Court of Claims was constituted in substantially its present form during the eleven-year period between 1855 and 1866. The history of this early legislation demonstrates that the Congress created the Court of Claims pursuant to Article III of the Constitution as a constitutional court. Proposals to establish a board of commissioners rather than a court were defeated, and the judges of the Court of Claims were given life tenure during good be-

havior. When it became apparent that statutory provisions making judgments of the Court of Claims subject to congressional and administrative review prevented appeal from such judgments to the Supreme Court, the Congress promptly amended the statutes to remove those provisions. After the last such amendment in 1866, this Court amended its rules to provide for appeals from judgments of the Court of Claims and has since reviewed such judgments on innumerable occasions. In 1871, this early history of the Court of Claims was reviewed in *United States* v. *Klein*, 13 Wall. 128, 144-145. This Court there stated that "the Court of Claims has exercised all the functions of a court" and "is thus constituted one of those inferior courts which Congress authorizes" once the legislative and administrative review of its judgments had been removed.

On a number of subsequent occasions, this Court reasserted the view that the Court of Claims had been created as a constitutional court under Article III. At no time during this period did the Congress express any disagreement or attempt to change the status of the Court of Claims to that of a legislative court. Indeed, the Congress reenacted the basic jurisdictional statute of the Court of Claims in 1887 as part of the Tucker Act, which also conferred concurrent jurisdiction on the federal district courts. This reenactment occurred only eight years after this Court, in *United States* v. *Union Pacific R. Co.*, 98 U.S. 569, 603, had again asserted the view that the Court of Claims had been created under Article III. It is an established rule that the Congress in reenacting a statute is presumed to have adopted the interpretation given to the prior statute.

Nevertheless, the *Bakelite* case, in 1929, stated in *dicta* that the Court of Claims was a legislative court, and the

Williams case, in 1933, so held. We believe that these decisions were in error, and should be reconsidered by this Court. They disregarded the plain intent of the Congress and departed from the view which had seemed to be settled by this Court for more than 60 years. In addition, the *Williams* case held Article III of the Constitution in extending the judicial power to "controversies to which the United States shall be a party" does not mean what it plainly says, but rather applies only to controversies in which the United States is a party plaintiff. The contrary holding in *Minnesota* v. *Hitchcock*, 185 U.S. 373, 384-386, was overruled. The principal reason given in the *Williams* opinion for this holding was that the draftsmen of the Constitution did not contemplate the possibility that the United States might be a party defendant because of its sovereign immunity from suit. However, there is good reason to believe that the draftsmen of the Constitution recognized that the United States could waive its sovereign immunity and consent to be sued.

The Solicitor General, who had urged the result in *Williams*, later requested this Court to reexamine and overrule that decision, in *Pope* v. *United States*, 323 U.S. 1. This Court did not deem that course to be necessary for the decision in the *Pope* case, but also refrained from reaffirming the *Williams* decision and stressed the similarity between the Court of Claims and the District of Columbia courts, which have been held to be constitutional courts.

In 1953, the Congress enacted a statute declaring the Court of Claims "to be a court established under article III of the Constitution of the United States." The legislative history of that statute demonstrates that the Congress thoroughly examined the problem, and concluded that *Williams* had been wrongly decided. This conclusion by the Congress is entitled to great weight, even though not bind-

ing insofar as the interpretation of prior statutes is concerned, and in itself justifies a reconsideration by this Court of the result in the *Williams* case.

Furthermore, the 1953 Act would seem to establish conclusively that the Court of Claims has been a constitutional court since 1953. The cases make clear that the establishment and jurisdiction of both federal constitutional courts and federal legislative courts is a matter primarily for determination by the Congress. This being true, determination of whether a particular court has been established as a constitutional court under Article III or a legislative court under Article I must depend upon the intent of the Congress.

The Congress has expressly stated its intention in the 1953 Act that the Court of Claims be a constitutional court established under Article III. While this was done in the form of a declaration that the Court of Claims had originally been created under Article III, that declaration is entitled to future effect even if the Congress was mistaken about this. *Postmaster-General* v. *Early*, 12 Wheat. 136, 148-149.

The status of the Court of Claims as a constitutional court does not raise any serious question about the great bulk of its traditional jurisdiction. The district courts, which have always been considered to be constitutional courts, have long exercised concurrent jurisdiction with the Court of Claims over claims against the United States founded upon the Constitution, statutes, and express or implied contracts. There may be some doubt as to whether the Court of Claims, as a constitutional court, can be required to accept jurisdiction of congressional reference cases. These doubts were brought to the attention of the Congress when the 1953 Act was under consideration, however, and the Congress elected to declare the Court of Claims to be a constitutional court with this knowledge.

We believe that the Court of Claims has always been a constitutional court, but if it were a legislative court prior to the 1953 Act the change in status effected by that Act did not necessitate reappointment of the judges of the Court of Claims. No change was made in their duties, and they were appointed by the President, confirmed by the Senate and serve during good behavior, as required by the Constitution.

ARGUMENT

I

The Court of Claims Was Created As A Constitutional Court

The Solicitor General, in his brief, has invited this Court to reexamine the holding in the *Bakelite* case, and has persuasively argued the view that the Court of Customs and Patent Appeals was created as and has always been a constitutional court. We join in this request by the Solicitor General, and we are in accord with his views. If *Bakelite* is overruled the similar decision in the *Williams* case can hardly stand. As we noted at the outset, *Williams* relied heavily on the *Bakelite* decision, expressing the view that the situation of the two courts concerned could not be differentiated for purposes of determining their status as constitutional or legislative courts. Moreover, the opinion in the *Bakelite* case devoted considerable attention to the Court of Claims, utilizing a conclusion that the Court of Claims was a legislative court to support the holding that the Court of Customs Appeals had that status. In view of this interrelation between the status of the two courts and between the *Bakelite* and *Williams* decisions, we think it may be helpful to this Court to indicate the reasons that lead us to believe that *Williams* was wrongly decided and that the Court of Claims was

created as a constitutional court under Article III of the Constitution.

1. The status of the Court of Claims in the governmental hierarchy was developed and, it was supposed, determined during the first eleven years of its existence. The bill initially introduced, in 1854, proposed the establishment of a board of three commissioners (Cong. Globe, 33d Cong., 2d Sess., p. 71); but after debate in the Senate (*id.*, at pp. 71-73) the bill was referred to a special committee, which reported back an amended bill providing for a "Court of Claims" of three judges holding office during good behavior (*id.*, at pp. 105-106). Senator Weller proposed an amendment to create a "board of commissioners" rather than a court, so that the tenure of the members could be limited to a fixed term (*id.*, at p. 107), but this amendment was rejected after considerable debate (*id.*, at pp. 107-114). It is fairly apparent from these debates that the alternatives were assumed to be a court exercising judicial power under Article III or a non-judicial board of commissioners. Nothing was said about the establishment of a legislative court under Article I even though the legislative court doctrine had been broached some 27 years previously in *American Ins. Co.* v. *Canter*, 1 Peters 511, 546.

The bill which became law on February 24, 1855, 10 Stat. 612, did not give finality to the decisions of the court, but made such decisions subject to review and approval by the Congress. President Lincoln recommended that the decisions of the court be made final, stating that the "investigation and adjudication of claims, in their nature belong to the judicial department" and should be removed from the legislature. Cong. Globe, Dec. 3, 1861, p. 2, Appendix; 37th Cong., 2d Sess. The Congress enacted a statute, 12 Stat. 763, intended to make the judgments of the court final and to provide for appeals to the Supreme Court, but also in-

cluded a provision that no money should be paid out of the treasury on any claim adjudicated by the Court of Claims until an appropriation therefor had been estimated by the Secretary of the Treasury. Because of this administrative review to which the judgments of the court were subjected, *Gordon* v. *United States*, 2 Wall. 561, dismissed for want of jurisdiction an attempted appeal to the Supreme Court from a judgment of the Court of Claims. An elaborate opinion prepared by Chief Justice Taney, who died before the decision of the case, was later published in 117 U.S. 697.

This initial eleven-year period in the creation of the Court of claims was completed in 1866, shortly after the decision in the *Gordon* case, when the Congress repealed the objectionable provision for administrative review (14 Stat. 9) and this Court amended its rules to provide for appeals from judgments of the Court of Claims (3 Wall. VII-VIII). Following these amendments to the statute and to this Court's rules, the Supreme Court took jurisdiction of the first appeal from a judgment of the Court of Claims, *De Groot* v. *United States*, 5 Wall. 419, and, of course, has since taken jurisdiction of countless appeals from such judgments. Chief Justice Taney, in his opinion in the *Gordon* case, stated that "this Court has no appellate power over these special tribunals, and cannot, under the Constitution, take jurisdiction of any decision, upon appeal, unless it was made by an inferior court, exercising independently the judicial power granted to the United States. It is only from such judicial decisions that appellate power is given to the Supreme Court." 117 U. S., at p. 704. The acceptance by the Supreme Court of appeals from judgments of the Court of Claims, viewed in the light of this basis for the initial rejection of such appeals, certainly indicates a belief that the Court of Claims was an

inferior court established under Article III to exercise the judicial power of the United States.

This early history of the Court of Claims, and the significance given to that history at the time, is well expressed in *United States* v. *Klein*, 13 Wall. 128, 144-145, where this Court, some six years after the *Gordon* decision, said:

> "It was urged in argument that the right to sue the government in the Court of Claims is a matter of favor; but this seems not entirely accurate. It is as much the duty of the government as of individuals to fulfill its obligations. Before the establishment of the Court of Claims claimants could only be heard by Congress. That court was established in 1855 for the triple purpose of relieving Congress, and of protecting the government by regular investigation, and of benefitting the claimants by affording them a certain mode of examining and adjudicating upon their claims. It was required to hear and determine upon claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States. Originally, it was a court merely in name, for its power extended only to the preparation of bills to be submitted to Congress.
>
> "In 1863 the number of judges was increased from three to five, its jurisdiction was enlarged, and, instead of being required to prepare bills for Congress; it was authorized to render final judgment, subject to appeal to this court and to an estimate by the Secretary of the Treasury of the amount required to pay each claimant. This court being of the opinion that the provision for an estimate was inconsistent with the finality essential to judicial decisions, Congress repealed that provision. *Since then the Court of Claims*

has exercised all the functions of a court, and this court has taken full jurisdiction on appeal.

"*The Court of Claims is thus constituted one of those inferior courts which Congress authorizes,* and has jurisdiction of contracts between the government and the citizen, from which appeal regularly lies to this court." (Italics supplied.)

The above recital shows that the Congress in the first eleven years of the existence of the Court of Claims was constantly motivated by the purpose of constituting the Court of Claims as a true Article III court, acting promptly to correct deficiencies in the basic statute which were found to interfere with this purpose. The judges of the Court of Claims were given life tenure during good behavior, and at no time did the Congress indicate anything other than a purpose to create a constitutional court under Article III. This Court recognized that the Congress had accomplished its purpose once all legislative and administrative review of judgments of the Court of Claims had been eliminated, and accepted jurisdiction of appeals from such judgments. We submit, therefore, that the creation of the Court of Claims as a constitutional court under Article III was intended by the Congress, and that this intent received early recognition by the Supreme Court.

2. On numerous subsequent occasions, this Court expressed the view that the Court of Claims had been created and existed under Article III as a regular constitutional court. In *United States* v. *Union Pacific R. Co.*, 98 U. S. 569, 603, this Court stated that:

"Congress has, under this authority [Article III], created the district courts, the circuit courts, and the Court of Claims, and vested each of them with a defined portion of the judicial power found in the Con-

stitution. It has also regulated the appellate jurisdiction of the Supreme Court."

In *United States* v. *Louisiana*, 123 U.S. 32, an objection was raised to the jurisdiction of the Court of Claims over a suit brought by a State against the United States. Rejecting that objection, this Court first quoted the pertinent language of Article III (p. 35), and then held (p. 35) that:

> "The action before us, being one in which the United States have consented to be sued, falls within those designated, to which the judicial power extends; for, as already stated, both of the demands in controversy arise under laws of the United States. Congress has brought it within the jurisdiction of the Court of Claims by the express terms of the statute defining the powers of that tribunal, unless the fact that a State is a petitioner draws it within the original jurisdiction of the Supreme Court."

See, also, *Minnesota* v. *Hitchcock*, 185 U.S. 373, 386; *Kansas* v. *United States*, 204 U.S. 331, 342. In *Miles* v. *Graham*, 268 U.S. 501, this Court held that to impose an income tax upon the salary of a judge of the Court of Claims was "forbidden by the Constitution." This reference to the Constitution must have been to the provision in Article III that the compensation of judges of courts established pursuant to that Article "shall not be diminished during their Continuance in Office."

Throughout this period of some 60 years during which the status of the Court of Claims as a constitutional court seemed to be settled, the Congress never took any action to change its status to that of a legislative court. Rather, the Congress in 1887 reenacted the basic jurisdiction of the

Court of Claims as a part of the Tucker Act, 24 Stat. 505, and at the same time extended concurrent jurisdiction over the same claims (up to $10,000) to the federal district courts, which have never been considered to be anything other than constitutional courts. The Tucker Act was adopted only eight years after this Court, in *United States* v. *Union Pacific R. Co.*, *supra*, had expressly referred to the Court of Claims as having been created under Article III. The House Report on the bill enacted as the Tucker Act pointed out the advantages of having a court of justice ascertain rights as between litigants, and stated that it was proposed to extend the jurisdiction of the Court of Claims to include certain claims which "should be asserted before a judicial and not a legislative tribunal." The Report also added that greater efficiency and justice would be secured "from the separation of the legislative and judicial functions." H. Rept. No. 1077, 49th Cong., 1st Sess., pp. 4, 5.

It is, of course, an established rule that the Congress in reenacting a statute is presumed to have adopted the construction given to the same language in the prior statute. See, *e.g.*, *Shapiro* v. *United States*, 335 U.S. 1, 16, and cases there cited. In reenacting the statutes governing the jurisdiction of the Court of Claims as a part of the Tucker Act, the Congress must, therefore, have intended to adopt the then settled view that the Court of Claims exercised this jurisdiction under Article III of the Constitution and to continue the Court of Claims in existence as a constitutional court.

3. Despite this imposing body of authority, *dicta* in the *Bakelite* case expressed the view that the Court of Claims was a legislative court. The principal authorities cited to support this view were two cases in which this Court had refused to review judgments of the Court of Claims because they were subject to administrative review. See

279 U.S., at pp. 454-455. Neither of those decisions had characterized the Court of Claims as a legislative court, and, as previously noted, this Court had consistently reviewed judgments of the Court of Claims where not subject to legislative or administrative review. This *dictum* in *Bakelite* was, of course, converted into a holding by the *Williams* decision, rendered in 1933.

With all deference, but with the frankness which the subject demands, we suggest that the observations of the Court in *Bakelite* and its decision in *Williams* were seriously in error. The *Williams* decision seriously affected an important judicial tribunal, and upon dubious reasoning. The consistent expressions by this Court over a period of many years that the Court of Claims was a constitutional court were discarded as having been made "more or less irrelevantly," and the intent of the Congress was not examined. Furthermore, *Williams* held, for the first time, that the language of Article III, section 2, extending the judicial power "to controversies to which the United States shall be a party," should not be given its plain meaning and should be limited to controversies to which the United States shall be a party *plaintiff*.

This construction of "controversies to which the United States shall be a party" had previously been considered and rejected in *Minnesota* v. *Hitchcock*, *supra*. This Court there stated that:

> "This is a controversy to which the United States may be regarded as a party. It is one, therefore, to which the judicial power of the United States extends. It is, of course, under that clause a matter of indifference whether the United States is a party plaintiff or defendant. It could not fairly be adjudged that the judicial power of the United States extends to those cases in which the United States is a party plaintiff

and does not extend to those cases in which it is a party defendant. [185 U.S., at p. 384]

. . . . . .

"While the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy. Indeed, the whole jurisdiction of the Court of Claims rests upon this proposition." [185 U.S., at p. 186]

The same view was again expressed by this Court in *Kansas v. United States*, *supra*, at p. 342.

The most tangible reason given by the *Williams* opinion for overruling the *Hitchcock* case and rewriting the plain language of the Constitution is that because of the sovereign immunity of the United States from suit the draftsmen of the Constitution did not contemplate the possibility that the United States might be a party defendant.[3a] But as is

[3a] *Williams* also relied upon the fact that the provision relating to "controversies to which the United States shall be a party" omitted the word "all" which is found in the provisions relating to certain other categories, such as "all cases of admiralty and maritime jurisdiction." 289 U.S., at pp. 572-573. Mr. Justice Story, in *Martin v. Hunter's Lessee*, 1 Wheat. 304, 334-335, pointed out that: "In respect to the first class, it may well have been the intention of the framers of the constitution, imperatively to extend the judicial power, . . . to *all* cases; and in the latter class, to leave it to congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate." Thus, "although it might be fit, that the judicial power should extend to all controversies to which the United States should be a party, yet this power might not have been imperatively given, lest it should imply a right to take cognisance of original suits brought against the United States as defendants in their own courts. It might not have been deemed proper to submit the sovereignty of the United States, against their own will, to judicial cognisance, either to enforce rights or to prevent wrongs; and as to the other cases of the second class, they might well be left to be exercised under the exceptions and regulations which congress might, in their wisdom, choose to apply."

See, also, II Story on the Constitution, §1675, p. 459 (4th ed.).

shown by the statements made by Madison and Marshall in the Virginia Convention, quoted in *Monaco* v. *Mississippi*, 292 U.S. 313, 323-324, informed persons of those times were completely familiar with the idea that sovereign powers might waive their immunity from suit and consent to be sued. Madison and Marshall said in so many words, with relation to the subject there under discussion, that if a State did consent to be sued Article III lodged the jurisdiction of the suit in the United States courts. It is difficult to believe that the enlightened men of that age did not recognize the same possibility with respect to consent by the United States to be sued in its own courts. Appendix B to the Brief for the United States filed in *Pope* v. *United States*, 323 U.S. 1, covers in detail the development of the concept of waiver of sovereign immunity, and demonstrates that this concept was well established both in English law and in the American States at the time of the adoption of the Constitution.

4. In *Pope* v. *United States*, *supra*, the Solicitor General invited this Court to reexamine and overrule its decision in the *Williams* case. Although this Court did not accept the invitation, it is significant that the Court did not reaffirm *Williams* and relied heavily upon the similarity between the Court of Claims and the District of Columbia courts." 323 U.S., at pp. 13-14. The latter courts were held to be constitutional courts in *O'Donoghue* v. *United States*, 289 U.S. 516, which was decided on the same day as the *Williams* case.

5. We have already referred to the 1953 Act declaring the Court of Claims "to be a court established under article III of the Constitution of the United States," and to the House Report with respect thereto expressing the view that the Court of Claims "was in fact established as, and continues to be, a constitutional court." We shall demonstrate, in the next part of this brief, that the declaration by the Congress in the 1953 Act is determinative of

the status of the Court of Claims for the period after the enactment of that statute. While an expression by a later Congress of its views is "not conclusive" insofar as the intent of an earlier Congress in enacting a statute is concerned, it is "entitled to great respect." *United States* v. *Clafin*, 97 U.S. 546, 548. See, *e.g.*, *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298, 310-313; *N. Y. & Norfolk R. R.* v. *Peninsula Exchange*, 240 U.S. 34, 39. The House Report demonstrates that the matter was thoroughly considered by the Congress, which reached the conclusion that the *Williams* case was wrong and that Congress in creating the Court of Claims and thereafter had intended it to be a constitutional court under Article III. H. Rept. No. 695, *supra*, 1953 U. S. Code Cong. and Adm. News 2006-2012. At the very least, this considered judgment by the Congress should justify a reconsideration by this Court of the ruling in the *Williams* case.

II

The Status of the Court of Claims As A Constitutional Court Since the 1953 Act Cannot Validly Be Questioned

The 1953 and 1958 Acts declaring the Court of Claims and the Court of Customs and Patent Appeals to have been established as constitutional courts under Article III obviously present no problem if this Court agrees with the views expressed in part I of this brief and overrules the *Williams* and *Bakelite* cases. In those circumstances, the temporary assignment of judges of the two courts to other constitutional courts, and the temporary assignment to the two courts of judges appointed to other constitutional courts, can unquestionably be done as the Congress intended. The Solicitor General, in his brief, has concentrated primarily on the effect of the 1958 Act on the status of Judge Jackson, and thus has argued that the legisla-

tion conferred Article III status on the judges of the Court of Customs and Patent Appeals, whatever may have been the effect of the legislation upon the status of the court itself. While we are in substantial agreement with this argument, we are also convinced that the 1953 and 1958 Acts fixed the status of the Court of Claims and the Court of Customs and Patent Appeals as constitutional courts even if—contrary to our view—they were legislative courts prior to those Acts.

Mr. Justice Rutledge, concurring in *National Ins. Co.* v. *Tidewater Co.*, 337 U.S. 582, 604-605, referred to "all of the contradictions, complexities and subtleties which have surrounded the courts of the District of Columbia in the maze woven by the 'legislative court—constitutional court' controversy running through this Court's decisions concerning them." The four opinions in that case, none of which spoke for a majority of the Court, lend substance to this description as well as forcefully expressing some of the views that have developed concerning this problem. But despite the "contradictions, complexities and subtleties" encountered in this area of the law, certain fundamental principles appear to be well defined.

Section 1 of Article III of the Constitution provides that the "judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." And section 2 of Article III provides that the "judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . [and] to Controversies to which the United States shall be a Party," among others. No one questions the fact that Article III does not in itself establish a system of courts (except for this Supreme Court) or automatically confer jurisdiction upon court established pursuant to the Article. Rather, the Congress has the power to de-

cide what courts are to be established under Article III and the extent of the jurisdiction to be exercised by such courts,[4] at least within the limits imposed by Article III.[5]

By expressly providing in Article III for the vesting of the judicial power of the United States in courts established under that Article, it would seem that the framers of the Constitution intended that Article to be the exclusive source of judicial power, with the judicial system being limited to courts established thereunder and exercising jurisdiction within the limits prescribed by Article III. And, there is a considerable body of contemporaneous evidence supporting this view.[6] Nevertheless, *American Insurance Co.* v. *Canter*, 1 Peters 511, 546, held that the Congress could create so-called "legislative courts" under Article I of the Constitution to exercise judicial power, and this doctrine has continued to persist. It is clear, however, that the establishment and jurisdiction of federal legislative courts, like the establishment and jurisdiction of federal constitutional courts, is a matter primarily for determination by the Congress.

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[4] See, *e. g.*, *Lockerty* v. *Phillips*, 319 U.S. 182, 187; *Lauf* v. *E. G. Shinner & Co.*, 303 U.S. 323, 330; *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 233-234.

[5] It has often been said that constitutional courts established under Article III cannot be required by the Congress to exercise jurisdiction of a kind not specified in Article III. *E.g.*, *Radio Comm.* v. *General Electric Co.*, 281 U.S. 464, 469; *Hayburn's Case*, 2 Dallas 409, 410. This limitation has been held to be inapplicable to the District of Columbia courts, *O'Donoghue* v. *United States*, 289 U.S. 516, and perhaps with respect to other courts in some circumstances. See the opinion of Mr. Justice Jackson in the *Tidewater Co.* case, 337 U.S., at pp. 588-600. The *Williams* case, in attempting to justify its holding that the Court of Claims is a legislative court even though its basic jurisdiction is concurrent with the federal district courts and its decisions subject to review by this Court, expressed the view that judicial power apart from that arising under Article III may be conferred "upon constitutional courts" as well as legislative courts. 289 U.S., at p. 565.

[6] See the concurring opinion of Mr. Justice Rutledge and the dissenting opinions of Chief Justice Vinson and Mr. Justice Frankfurter in the *Tidewater Co.* case, 337 U.S., at pp. 615-616, 627-634, 647-654.

The problems arise in determining whether a particular court created by the Congress was established under Article III as a constitutional court or under Article I as a legislative court. We submit that this determination should turn upon the intent of the Congress, just as is true with respect to any other problem of statutory construction. As stated in the House Report on the bill which became the 1953 Act, "it would certainly seem proper for the body which created the Court of Claims to declare whether, in the creation of it, Congress intended to exercise article I or article III power."[7] This would seem to be a self-evident proposition but for a *dictum* in *Ex Parte Bakelite Corporation*, 279 U.S. 438, 459.

An argument was made in *Bakelite* that the Congress "intended the Court of Customs Appeals to be a constitutional court because the members of the court were not limited to a fixed term, and the Congress had followed a practice of distinguishing between constitutional and legislative courts "by making no provision respecting the tenure of judges of the former and expressly fixing the tenure of judges of the latter." 279 U.S., at p. 459. In rejecting this argument as fallacious, the opinion in *Bakelite* states that the argument "mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred." *Ibid.* The Court then went on to point out that the practice relied upon as the basis for this argument did not in fact exist. *Ibid.* No authority was cited for this *dictum*, and we know of none apart from the *Bakelite* case itself. Furthermore, the asserted true test of the "power under which the court was created" merely restates the basic issue, and would appear to neces-

[7] H. Rept. No. 695, *supra*, 1953 U.S. Code Cong. and Adm. News, at p. 2009.

stitute an inquiry into what the Congress intended to be the power under which it created the court.

But whether the test be stated in terms of the intent of the Congress or in terms of the power under which it acted, the answer has been clear since 1953 at least. The Congress, by the statute enacted in that year, expressly "declared" the Court of Claims "to be a court established under article III of the Constitution of the United States." And, as previously noted, a similar express statutory declaration was made in 1958 with respect to the Court of Customs and Patent Appeals.[8] Whatever may have been the situation prior to those statutes, certainly the Congress since their enactment has declared the Court of Claims and the Court of Customs and Patent Appeals to be constitutional courts, and the power under which those courts have existed since 1953 and 1958, respectively, has been Article III of the Constitution.

It is true, as the committee reports demonstrate, that the Congress by this legislation intended to express the view that the courts in question had originally been created and have always been constitutional rather than legislative courts. But even if that view was mistaken and the expression of it ineffectual insofar as the past status of the courts is concerned, that does not prevent the declaration of the Congress from being given effect in the future. This was decided in *Postmaster-General* v. *Early*, 12 Wheat. 136, 148-149, where this Court held, in an opinion by Chief Justice Marshall, that:

> "It is true, that the language of the section indicates the opinion, that jurisdiction existed in the circuit courts, rather than an intention to give it; and a mistaken opinion of the legislature concerning the law,

[8] Similar legislation was also enacted with respect to the United States Customs Court in 1956. 70 Stat. 532, 28 U.S.C. § 251, as amended.

does not make law. But if this mistake be manifested in words competent to make the law in future, we know of no principle which can deny them this effect. The legislature may pass a declaratory act, which, though inoperative on the past, may act in future. This law expresses the sense of the legislature on the existing law, as plainly as a declaratory act, and expresses it in terms capable of conferring the jurisdiction."

See also, *United States* v. *Clafin*, 97 U.S. 546, 548-549. Certainly, the 1953 and 1958 Acts express the sense of the Congress that the Court of Claims and the Court of Customs and Patent Appeals are constitutional courts, and indeed are declaratory acts to that effect, in language capable of being given future effect.

We may note that there cannot be any serious question about the constitutionality of the exercise by the Court of Claims of the great bulk of its traditional jurisdiction, if its status be that of a constitutional court existing under Article III. The district courts, which are indisputably constitutional courts, have long exercised concurrent jurisdiction with the Court of Claims over claims against the United States "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounded in tort." 28 U.S.C. §§ 1346(a)(2), 1491. The Court of Claims review of the Indian Claims Commission (25 U.S.C. § 70s) differs in no essential way from the review exercised by the courts of appeals over numerous administrative agencies. Furthermore, this Court, which is an Article III constitutional court, has constantly exercised jurisdiction to review the judgments of the Court of Claims with respect to these matters from

the year 1866 on. See, *e.g.*, *Pope* v. *United States*, 323 U.S. 1, 13.[9]

There may be some doubt as to whether the Congress can continue to require the Court of Claims, as a constitutional court, to accept congressional reference cases for purposes of a report thereon to the Congress. 28 U.S.C. § 1492. Such cases might be considered to be advisory rather than judicial in nature, and for that reason to be beyond the power of the Congress to impose upon a constitutional court. See *In re Sanborn*, 148 U.S. 222; *Gordon* v. *United States*, 117 U.S. 697. But even as to these cases, it would seem to be equally permissible for the Congress to impose advisory functions on the Court of Claims as on the District of Columbia courts which are constitutional courts. See *O'Donoghue* v. *United States*, *supra*; *Pope* v. *United States*, *supra*, at pp. 13-14. In any event, the doubts about this matter were brought to the attention of the House Judiciary Committee by Judge Madden in testifying with respect to the bill that became the 1953 Act,[10] and Senator Gore discussed this problem during the Senate debates. 99 Cong. Rec. 8943-8944. Thus, the Congress by enacting the 1953 Act elected to remove any doubt as to the status of the Court of Claims as a constitutional court regardless of whether its jurisdiction over congressional reference cases was affected.

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[9] The jurisdiction thus conferred upon the Court of Claims by 28 U.S.C. § 1491 would seem to come within the provision of section 2 of Article III extending the judicial power to cases arising under the Constitution and laws of the United States. Jurisdiction over claims based upon express or implied contracts extends only to those contracts authorized by statute. See, *e.g.*, *Eastern Extension Tel. Co.* v. *United States*, 251 U.S. 355. See, also, the opinion of Mr. Justice Frankfurter in the *Tidewater Co.* case, 337 U.S., at p. 649. In addition, Article III jurisdiction over "controversies to which the United States shall be a party" would seem, on its face, to include suits in the Court of Claims to which the United States is necessarily a party defendant. We have already stated our reasons for believing that the contrary holding of the *Williams* case is erroneous.

[10] The hearings held by that Committee have not been printed.

We submit, therefore, that the status of the Court of Claims as a constitutional court has been settled by the 1953 Act insofar as the period since the effective date of that statute is concerned, whatever may have been its status prior to that date. And, the same conclusion would seem to follow with respect to the Court of Customs and Patent Appeals after the enactment of the 1958 Act. This being so, there would not seem to be any substantial question about the validity of an assignment of a judge of these courts, after the enactment of the statutes in question, to serve on another constitutional court, or about the validity of an assignment of a judge of some other constitutional court to serve on either of the two courts.

Assuming (contrary to our firm view as set out in Part I hereof) that the Court of Claims was a legislative court prior to 1953 and that the 1953 Act changed it into a constitutional court, there is nothing in the Constitution of which we are aware that would compel reappointment of the judges of the Court of Claims or prevent the judges already appointed from continuing to serve. They already had lifetime tenure during good behavior, as required by Article III, and were originally appointed by the President and confirmed by the Senate, as required by section 2 of Article II. It is well established that "Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed." *Shoemaker* v. *United States*, 147 U.S. 282, 301. The duties of the Court of Claims were not changed by the 1953 Act in any way that is material for present purposes. Even if it were a "legislative court" prior to 1953, this meant only that it was created under Article I rather than Article III of the Constitution, and not that it had no constitutional basis at all. While the Congress can no longer diminish the compensation paid to judges of the Court of Claims during their contin-

ance in office, the surrender of this right hardly suffices to require that incumbent judges again be nominated and confirmed. Certainly, neither the Congress nor the President has thought so.

We submit, therefore, that the declaration by the Congress in the 1953 Act that the Court of Claims is a constitutional court created under Article III should be given effect for the period since the enactment of that statute, even if the Court of Claims previously was a legislative court, so as to permit the temporary assignment of a judge of the Court of Claims to some other constitutional court and the temporary assignment to the Court of Claims of a judge appointed to another constitutional court.

Conclusion

While this case directly concerns the status of the Court of Customs and Patent Appeals, and of a judge thereof, the issues involved are of considerable significance to the Court of Claims and its judges. For the reasons stated above, we believe that the Court of Claims was created as a constitutional court and that the contrary decision in *Williams* should be overruled as wrongly decided. In any event, the status of the Court of Claims as a constitutional court during the period since the adoption by the Congress of the 1953 Act cannot be seriously questioned.

Respectfully submitted,

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(6221-6)

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 669

BENNY LURK,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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May 1, 1961

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REPLY BRIEF FOR PETITIONER

The United States has filed a brief of 126 pages, plus two appendices, in order to demonstrate that the court below properly dismissed as frivolous petitioner's application for leave to appeal *in forma pauperis*. The sheer bulk of that brief alone, augmented as it is by an *amicus* brief on behalf of the judges of the Court of Claims, stands as mute testimony to the non-frivolous nature of that application and to the error of the denial of leave to appeal.

The major portion of the brief of the United States is addressed to the merits of one of the two issues tendered below on behalf of petitioner. That issue concerns the constitutionality of the assignment of a retired legislative court judge to preside over a criminal trial in an Article III court. Having urged below that this issue is too frivo-

lous or insubstantial to warrant review and still continuing to press that contention before this Court, the United States finally concedes (Br., p. 49) that the matter has "now become troublesome and needs resolution" and the hope is expressed "that the Court may see fit to pass directly upon the problem." And in the course of its argument, the United States asks this Court to overrule at least one[1] if not two[2] or three[3] of its decisions, which in turn derive from a decision rendered for the Court by Chief Justice Marshall in 1828.[4]

Yet the United States continues to insist that the judgment below is correct and that the petitioner has been accorded all the appellate review rights to which he was entitled.

I.

The Impropriety of the Denial of Leave to Appeal.

The United States again misstates the nature of the proceedings below and refuses to acknowledge the full sweep of the appellate review doctrines unanimously established by this Court in *Ellis* v. *United States*, 356 U.S. 674. Indeed, the procedures and principles suggested in the Government's brief are so destructive of the fair and equal treatment that must be accorded indigent defendants seeking to appeal from their convictions as to constitute a crisis in the administration of appellate criminal justice in the Court of Appeals for the District of Columbia Circuit. If those procedures and principles were

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[1] *Ex parte Bakelite Corp.*, 279 U.S. 438. See Br., pp. 97-98.

[2] *Williams* v. *United States*, 289 U.S. 553. See Br., pp. 112-114.

[3] *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693. See Br., pp. 117-121.

[4] *American Insurance Co.* v. *Canter*, 1 Pet. 511.

to be followed in the court below—and concededly any suggestions of the Solicitor General are influential—an unwarranted discrimination against indigent appellants would soon manifest itself, in addition to that already present in this case. Only this Court can bring order out of this growing chaos and restore the principles of the *Ellis* case.

At the crux of the Government's position is its insistence (Br., p. 30) that since petitioner had counsel assigned to him, a transcript prepared at Government expense, the benefit of "extended" written argument by counsel, and "adequate" consideration by a three-judge panel, he was entitled to no more. In substantiation of that conclusion, the Government proceeds to create a novel two-step procedure for indigent appellants (Br., pp. 33-35):

(1) The first step is said to occur when appointed counsel requests a transcript of the trial proceedings. At that point, the suggestion is that the decision to grant or deny the request must be made on the basis of potentialities and that the frivolousness of the issues sought to be raised must be clearly apparent from the face of the request. It is here—and here only—that the Government would recognize and apply the *Ellis* doctrine. In other words, it is the request for a transcript, not the petition for leave to appeal and supporting memoranda, which the Government says should be subjected to the *Ellis* test of frivolousness.

(2) The second step is said to be reached after the transcript has been obtained and the issues "briefed (even though preliminarily)" in the form of accompanying memoranda (Br., p. 34). Here no effort is made to apply the *Ellis* doctrine. Instead of testing the petition and memoranda in the light of frivolousness of the issues raised, the court is said to be justified in denying leave to appeal "when in its opinion the issues presented show such lack

of substance that further review would be an unnecessary consumption of the court's time" (Br., pp. 34-35). Thus would the concept of substantiality be substituted for that of frivolousness.

Petitioner submits that neither the *in forma pauperis* statute, 28 U.S.C. §1915, nor the *Ellis* decision justifies such a bifurcation of this preliminary appellate procedure. Section 1915 very plainly says that an appeal—which normally includes all steps through oral argument on the merits—shall be allowed an indigent if "taken in good faith." And the *Ellis* decision states, 356 U.S. at 674, that the applicant's good faith under that legislative provision is established "by the presentation of any issue that is not plainly frivolous." The *Ellis* decision further warns against converting this good-faith test "into a requirement of a preliminary showing of any particular degree of merit." 356 U.S. at 675. Not one syllable in the *Ellis* opinion suggests that its impact is limited to applications for trial transcripts or that the good-faith test can be converted into a requirement of substantiality or of some degree of merit once the transcript has been obtained and preliminary arguments made in light thereof. And nothing in the brief of the United States reveals any basis whatever for so limiting *Ellis* other than an apparent desire to close the appellate doors to as many indigents as possible.

Petitioner, of course, does not urge that he has a constitutional right to oral argument of his appeal, or even that oral argument is always a necessary part of an appeal. But he does insist that any determination to dismiss his appeal before reaching oral argument on the merits must be made in accordance with Section 1915 as interpreted by the *Ellis* case. And under that provision, an appeal can be cut off short of oral argument only if a similar prepaid appeal could be so dismissed under Rule 39(a)

of the Federal Rules of Criminal Procedure. Under that rule, a prepaid appeal can be dismissed only if the question raised on appeal "does not present a reviewable issue" within the jurisdiction of the appellate court. *United States* v. *Johnson*, 327 U.S. 106, 113.

Whether an issue is "reviewable" or "non-frivolous" turns not on its substantiality or merit but on its susceptibility to review by the appellate court. Many criminal appeals, both prepaid and *in forma pauperis*, ultimately turn out to be insubstantial and without merit. Yet they are not properly dismissable prior to a full-scale review on the merits if the issues they pose may fairly be considered reviewable or non-frivolous. And as long as the criminal appellant—be he indigent or wealthy—is granted the privilege of pursuing the full appellate process on the tendering of a reviewable or non-frivolous issue, he cannot be cut short on the theory that the issue is insubstantial or without merit.

Thus the Government's suggestion that this indigent petitioner's right to full appellate review may be rebuffed simply because the issues tendered on his behalf appear to be insubstantial constitutes an invidious discrimination against a pauper. A wealthy appellant, with money to purchase his own transcript, would not be subject to dismissal under Rule 39(a) for presenting a reviewable but insubstantial question. Precisely this kind of discrimination has been outlawed time and again by this Court in cases arising in state courts. *Griffin* v. *Illinois*, 351 U.S. 12; *Burns* v. *Ohio*, 360 U.S. 252; *Smith* v. *Bennett*, Nos. 174 and 177, Oct. Term, 1960 (April 17, 1961). As stated in the *Burns* case, 360 U.S. at 257-258, there is "no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendants." Any contrary suggestion by the United States-

is no less obnoxious than those that have been made by certain state governments.

The practical difficulties in the way of adopting the Government's suggested two-step procedure weigh decisively against its adoption. The *Ellis* doctrine of frivolity, says the Government, should apply only to counsel's request for a transcript. But what issues can be tendered and tested by that standard when counsel is seeking a transcript in order to determine what issues are in fact present? In the instant case, for example, counsel sought a transcript (R. 10-11) because he could not otherwise determine whether there was any basis whatever for petitioner's *pro se* assertions and because counsel himself was "not convinced that the trial was conducted free of all reversible error or that there was a complete absence of plain errors going to the justness and fairness of the proceeding" (R. 10-11). The two issues later tendered on petitioner's behalf were not utilized as a basis for securing the transcript; and, indeed, the first issue subsequently presented, relating to trial references to petitioner's past criminal record, did not become fully apparent until after the transcript had been secured and examined in detail. Quite obviously, then, the *Ellis* doctrine was not applied, and could not have been applied, in determining whether to grant this request for a transcript.

In reliance on the *Ellis* doctrine, petitioner's counsel then proceeded to formulate two issues and to demonstrate their non-frivolousness. But apparently, in light of the Government's analysis, counsel wrote either too much or too little. He wrote too much in that he is now said to have "extensively" briefed these issues to the point of revealing "the insubstantiality of the claims of error or the lack of a justiciable question" (Br., p. 35). Such a comment reveals a somewhat wry sense of humor in view of the extensive

briefs filed in this Court revealing at least one issue of monumental proportions.

On the other hand, perhaps counsel did not write enough in his memoranda below; perhaps if he had filed a 126 page memorandum with the fine detail of the Government's brief in this Court the United States would concede that the issues were at least not insubstantial and merited further briefing and consideration, including oral argument before the Court of Appeals.

The short of it is that there is no ascertainable basis, under the Government's suggestion, for appointed counsel to know how much showing must be made to demonstrate the substantiality of an issue. Indeed, any standard of substantiality inevitably tends to become a standard relating to the merits of the case. And the whole thrust of Section 1915 thus tends to be shifted to a demonstration of ultimate merit in order to have an appeal allowed. But Congress has not so provided. And if petitioner is now to be tested by a retroactive application of a new double-barreled standard as formulated by the Government, serious due process issues are thereby raised. See *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673, 678-680.

To bring clarity to this situation, the Court may deem it appropriate to "draw upon . . . [its] supervisory power over the administration of criminal justice" in the federal courts, *Grunewald* v. *United States*, 353 U.S. 391, 424; *McNabb* v. *United States*, 318 U.S. 332, 341, to lay down "certain fundamental requirements . . . [to] be observed by the Court of Appeals," cf. *Western Pacific Railroad Case*, 345 U.S. 247, 260, in acting upon applications for leave to appeal under Section 1915.[5] Perhaps the courts

[5] It is clear that this power extends to formulating rules of procedure for courts of appeals. *Western Pacific Railroad Case*, 345 U.S. 247. In that case, although recognizing that "each Court of Appeals is vested with a wide latitude of discretion to decide

of appeals might be required to adopt a procedure whereby an indigent petitioner, or his court-appointed counsel, prepares only a general statement of the non-frivolous issues which he intends to present on the appeal, with appropriate record references, comparable to the statement of questions presented on a prepaid appeal and filed before the briefing and oral argument (see, e.g., Rule 15 of the Rules of the Court of Appeals for the District of Columbia Circuit). This would take the place of the memorandum, as required by the court below, that attempts to explain the non-frivolousness of the issues raised. The burden would then be on the Government—as it is in prepaid criminal appeals—to establish by motion and accompanying memorandum that the questions presented are frivolous and non-reviewable and that leave to appeal should therefore be denied. The petitioner should, of course, be given an opportunity to reply to the Government's contention.

Such a procedure would have manifold advantages. Most importantly, under the statutory scheme as delineated in the *Ellis* case, this procedure would provide equality in fact with the procedure in prepaid appeals. In the latter appeals, appellants are not required to file preliminary memoranda attesting to the non-frivolousness or reviewability of the issues they seek to raise; such a matter must be raised by motion by the Government or by the court *sua sponte*. See *United States* v. *Johnson*, 327 U.S. 306, 313. Furthermore, this suggested procedure would obviate a great deal of unnecessary briefing by both parties and would save the time of court and counsel. If the Government were obligated to demonstrate affirmatively that the

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for itself just how that power is to be exercised," 345 U.S. at 259, this Court prescribed certain minimum "fundamental requirements" for them in utilizing their power to sit *en banc* under 28 U.S.C. §46(c).

issues are non-reviewable, there would be fewer unreflective oppositions to *in forma pauperis* applications which only confuse the issues and dilute the meaning of the *Ellis* case.

This procedure, of course, would not eliminate in all cases briefing to the extent that has occurred in this proceeding below. But it would relieve appointed counsel of the confusing and uncertain burden of going forward with proof of the non-frivolousness or reviewability of the good-faith issues presented. Non-frivolousness is too evanescent a standard to discuss intelligently in the absence of some indication as to why the standard has not been met. The fact that memoranda of appointed counsel now frequently deal with the merits of the issues is due in large part to the inherent difficulty of dealing in a vacuum with the question of non-frivolousness.

But whatever the standards of review or the procedures to be followed in the court below, the basic fact remains that the two issues presented below on behalf of petitioner should have compelled the Court of Appeals to grant a full-scale review. The non-frivolousness of the constitutional issue is by now too obvious to require further elaboration.[6] And the more than four pages devoted by the United States (Br., pp. 40-45) to a discussion of the non-constitutional issue, relating to the trial references to

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[6] The United States continues to insist (Br., p. 45) that the constitutional issue as raised below conceded the validity of the 1958 amendatory legislation and was confined to the impact of that legislation on a retired judge of a court constitutional in nature after 1958. The issue was in no way so limited; nor was any concession made as to the validity of the 1958 legislation. As stated in counsel's memorandum below (R. 27): "The ultimate question thus is whether a designation and assignment to the court below of a judge who retired in 1952 from the Court of Customs and Patent Appeals can *constitutionally* be made so as to authorize such a judge to exercise the judicial powers of the court below." That question embraced all facets of the constitutional issues discussed herein by the United States.

petitioner's criminal record, serve only to augment the non-frivolousness and the reviewable nature of that issue. Nothing that the Government has said negates the controlling statement by this Court in *Farley* v. *United States*, 354 U.S. 521, 522, that this type of issue "cannot be characterized as frivolous."

II.

The Constitutional Incapacity of Judge Jackson.

The United States, having finally concluded (Br., p. 49) that the question as to Judge Jackson's capacity to act as the trial judge in the District Court below "has now become troublesome and needs resolution," poses three propositions in support of his right to preside over petitioner's trial:

(a) Judge Jackson was at least a *de facto* judge;

(b) Judge Jackson has had Article III status at least since the 1958 amendment to 28 U.S.C. §211; and

(c) The Court of Customs and Patent Appeals always has been an Article III court and the contrary *Bakelite* decision should be overruled.

A. *The de facto argument*

The first line of defense taken by the United States (Br., pp. 50-59) is that Judge Jackson was at least a *de facto* judge whose title to the "office" of District Judge of the District Court for the District of Columbia cannot be challenged by petitioner on appeal.

Petitioner, of course, has no quarrel with the *de facto* doctrine or with the principles of public policy which underlie it. Nor does petitioner intend to engage in a

semantic argument with the Government over whether the *office* of District Judge of the District Court of the District of Columbia is under challenge. The simple fact is that petitioner's challenge goes to Judge Jackson's *competence under the Constitution* to exercise Article III judicial power and to render judgment in a criminal case necessarily involving the exercise of such power. At stake, then, is no formal defect in his authorization or designation, nor is there any question as to his right to act—on the District Court or elsewhere—within the constitutional scope of his status as a retired legislative court judge. The critical issue is a clear constitutional one. Does the Constitution permit a retired legislative court judge to exercise Article III judicial power by assignment or otherwise?

As the United States explained to this Court only last term (Brief of the United States in *United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685, No. 138, O.T., 1959, pp. 27-28):

> "The 'de facto' principle, in essence, has been applied where, unlike the case here, the judge's right to office is in question, or where, also unlike this situation, there has been an attack on some formal defect in a judge's authorization to act, such as in the case of designation and assignment. The 'de facto' doctrine does not reach the situation, such as the instant case, where a judge is expressly precluded from a specific type of judicial action by legislative mandate. *Were it otherwise, judges might then exceed their constitutional and statutory authority to act with impunity*, and the legislative prohibition of provisions like Section 46(c) would be completely undermined." [Emphasis added.]

In other words, where some constitutional or statutory provision forbids a judge from participating in a particular

type of judicial action, the *de facto* doctrine is inapplicable. To borrow the words quoted by the Government in its *American-Foreign Steamship* brief (p. 27) from the Vermont Supreme Court in *Watson* v. *Payne*, 94 Vt. 299, 301:

> ". . . [W]here it is expressly declared by constitutional or statutory provision that in certain specified cases a judge shall not sit or shall not act, or shall take no part in the decision, the authorities are almost uniform to the effect that any judgment rendered by such judge in such case is *coram non judice*, and void."

See also *People* v. *Bork*, 96 N.Y. 188; *Case* v. *Hoffman*, 100 Wis. 314, 352 358.

This Court has consistently recognized the voidness of judgments rendered by those judges lacking constitutional or statutory authority to sit in a given type of case. Thus in *American Construction Co.* v. *Jacksonville Railway*, 148 U.S. 372, where an appellate judge participated contrary to statute in an appellate decision setting aside an order originally entered by him as trial judge, the Court unequivocally voided the decision and ruled (148 U.S. at 387):

> "If the statute made him incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void, and should certainly be set aside or quashed by any court having authority to review it by appeal, error or certiorari."

And in *Frad* v. *Kelly*, 302 U.S. 312, 316, the order of a district judge was voided at the instance of a criminal defendant where the express provisions of the Probation Act negated the power of the judge to act after his designation and assignment to a particular court had terminated. Again last term, in *United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685, 691, in reliance on the fore-

going decisions, this Court voided an *en banc* judgment of a court of appeals in which a retired judge had participated contrary to a legislative mandate. See also *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132.

In this case the contention is that the Constitution, rather than a statute, rendered Judge Jackson, as a retired legislative court judge incompetent to sit in the instant criminal proceeding and to exercise Article III judicial power. Hence, by virtue of the foregoing authorities, the *de facto* doctrine is inapposite.

Petitioner's argument, of course, goes to something far more fundamental than the "office" of District Judge, a concept which seems to have mesmerized the United States. (See, particularly, Br., at pp. 57-59.) But even if we were to adopt the semantic nuances of the term "office" the *de facto* doctrine could not come into operation to preclude petitioner's challenge.

Under the "office" approach, there is no "office" of District Judge, for purposes of exercising Article III judicial power, which Judge Jackson could validly fill or purport to fill. The only "office" for which Judge Jackson ever was invested with power was that of a legislative court judge, capable of exercising such power on the Court of Customs and Patent Appeals and possibly on other courts by assignment where legislative powers were to be exercised. In such capacity he was "incapable of receiving" any Article III judicial power or utilizing such power in an Article III proceeding. To that extent there was no Article III "office" which Judge Jackson could fill.

Moreover, the United States Code establishes only 15 District Judges in the District Court for the District of Columbia. 28 U.S.C. §133. Judge Jackson's assignment (see petitioner's main brief, pp. 4-5) does not purport to

assign him to execute the "office" of any of those 15 judgeships by virtue of any vacancy or incapacity of an incumbent. He was assigned as a retired judge to an "office" in addition to those 15 judgeships. Presumably such an "office" was effective insofar as Judge Jackson was called upon to exercise any of the legislative powers which adhere to a hybrid court such as is here involved. But the ultimate question remains whether there was any "office" for the execution of Article III judicial power to which Judge Jackson could be assigned.

To argue, as does the United States, that Judge Jackson held the "office" of District Judge and thus became a *de facto* judge is to indulge in a "bootstrap" argument and to assume the very point in issue. If the Constitution precluded him from acting or serving in the capacity of an Article III judgeship, the additional Article III "office" which he purported to hold never came into legal existence. Such an "office" must be apart from the 15 judgeships authorized by Congress and could come into being only by virtue of the assignment statute, 28 U.S.C. §294(b). But if that statute cannot validly be applied to create an Article III "office" in the District Court for a retired legislative court judge, the "office" is non-existent in legal contemplation.

Hence the decision of this Court in *Norton* v. *Shelby County*, 118 U.S. 425, 441-442, cited with approval by the United States in its brief herein (pp. 52-53), becomes of controlling importance. There a state court had been declared to lack constitutional sanction or existence. And in answer to the contention that the members of that court were nonetheless *de facto* judges whose capacity could not be challenged, this Court said in language singularly pertinent to the contention of the United States in the instant case:

"This contention is met by the fact that there can be no officer, either *de jure* or *de facto*, if there be no office to fill. As the Act attempting to create the office of commissioner never became a law, the office never came into existence. Some persons pretended that they held the office, but the law never recognized their pretensions, . . .

". . . But the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office, and a public office can exist only by force of law. This seems to us so obvious that we should hardly feel called upon to consider any adverse opinion on the subject but for the earnest contention of plaintiff's counsel that such existence is not essential, and that it is sufficient if the office be provided for by any legislative enactment, however invalid. Their position is that a legislative Act, although unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. That position, although not stated in this broad form, amounts to nothing else. It is difficult to meet it by any argument beyond this statement. An unconstitutional Act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

Thus, in this case, where the Constitution forbids the legal existence of an Article III judgeship in the person of a retired legislative court judge, the office never existed *de jure* or *de facto*, and Judge Jackson became no more than an usurper to whose acts no validity can be attached. His

judgment can therefore be challenged by petitioner at any time, in any court, and in any appropriate manner.

B. *The post-1958 status of Judge Jackson*

The United States also suggests (Br., pp. 59-64) that, however legislative in nature may have been Judge Jackson's status prior to 1958, the enactment of the amendment to 28 U.S.C. §211 in 1958 certainly gave him Article III status thereafter.

The short answer is that the 1958 legislation is only prospective in nature. It does not purport to be retroactive in scope or to affect the constitutional status of any judge who had previously retired from the court.[7] The amendment was expressly premised on the fact, stemming from the *Bakelite* decision, that the court *"is now* constituted under section 211 of title 28, United States Code, and *is* classified as a legislative court." S. Rep. No. 2309, 85th Cong., 2d Sess. (1958), 2 U.S. Code Cong. and Adm. News (1958), p. 3909. The amendment was accordingly drafted in the present tense with an eye to the future. In the amendment's terminology, "Such court *is hereby declared to be* a court established under Article III of the Constitution of the United States." No effort was made to rewrite the status of the court prior to 1958 or to say that the court from the time of its conception in 1909 was declared to be an Article III court. And the legislative history cited by

[7] Compare the overt attempt to give retroactive effect to the 1930 legislation conferring good behavior tenure on judges of the Court of Customs and Patent Appeals: "For the purposes of section 260 of the Judicial Code, as amended, (relating to the resignation and retirement of judges of courts of the United States) any service heretofore rendered by any present or former judge of such court, including service rendered prior to March 2, 1929, shall be considered as having been rendered under an appointment to hold office during good behavior." Sec. 646 of Tariff Act of June 17, 1930, c. 497, 46 Stat. 762.

the United States (Br., pp. 68-74) tends only to confirm that conclusion.[8]

In view of that background, the 1958 amendatory legislation can fairly have no impact whatever on the capacity of Judge Jackson to perform Article III functions. The prospective intent and language of the 1958 declaration confine its thrust, if any, to those judges then sitting on the Court of Customs and Patent Appeals or becoming members thereafter. Judge Jackson took with him into retirement in 1952 only those legislative powers he acquired on appointment, and the effort to add to the powers of the court personnel in 1958 came too late.

On the other hand, even if the Government's analysis be accepted and the 1958 amendment be viewed as a *nunc pro tunc* declaration of Article III status, the way is still not clear to investing Judge Jackson with Article III power. The uncontestable fact is that the 1958 amendment was a mere characterization of the Court's status and was not intended to change the nature or functions of the court —a fact conceded by the United States (Br., pp. 67, 74). Yet under the ruling of the *Bakelite* case, 279 U.S. at 459, a mere legislative characterization or declaration of a tribunal's constitutional status is not controlling—an interpretation of the *Bakelite* case which is also conceded

[8] The United States, in attempting to explain away various legislative statements clearly indicating the prospective thrust of the three declarations of Article III status in 1953, 1956 and 1958, is forced to rely on such weak explanations as "must be attributed to oversight" (p. 72, n. 37), "The contexts in which these statements were made reveal that the committee meant that . . ." (p. 73, n. 38), and "merely an imprecise use of language" (p. 74, n. 39). Moreover, the United States concedes (p. 65, n. 33) that its own first reading of the 1958 amendment led it to assume in its brief in opposition to certiorari that the amendment changed the character of the court from a legislative to a constitutional court.

by the United States (Br., p. 106, n. 67). Only this Court, in the exercise of its supreme function of interpreting the Constitution and determining what constitutional article underlies a particular court, can effectively resolve such a matter.

Thus this Court's *Bakelite* decision stands squarely in the way of giving any effect to the 1958 amendatory legislation. Absent some change in the nature, jurisdiction or functions of the court, a statement of Congressional belief as to what constitutional power it was exercising when it created the Court of Customs and Patent Appeals 49 years earlier cannot overrule a definitive resolution to the contrary by this Court.

Nor can it be said (Brief for the United States, p. 60) that the 1958 enactment was an irrevocable renunciation of Congressional power to terminate the tenure or reduce the compensation of the judges of the Court of Customs and Patent Appeals. What Congress has renounced in 1958 it may some day in the future reinstate. Just as Congress cut the salaries of these judges in 1932, so again an economy drive may some day dictate another reduction in salaries. And as Senator Gore has made plain, 99 Cong. Rec. 8944, July 10, 1953, the effectuation of some of the legislative functions of a court such as the Court of Claims or the Court of Customs and Patent Appeals may call for a legislative redesignation "as a legislative court." In short, nothing in the legislative world should be deemed irrevocable.

C. *The request to overrule Bakelite*

Driven by the logic of the facts of history, the United States is forced to ask this Court to overrule the *Bakelite* decision. Only in that manner, presumably, can the judgment rendered against petitioner Benny Lurk be sustained.

Petitioner submits that the constitutional principles and practices surrounding the *Bakelite* decision are too firmly grounded to require or justify reexamination. The distinction between legislative and Article III courts goes all the way back to 1828 to Chief Justice Marshall's declaration in *American Insurance Co.* v. *Canter*, 1 Pet. 511.* And it was in light of that historic distinction that the *Bakelite* determination was made.

Both dangerous and dubious is the assumption made by the United States (Br., pp. 66, 97-98) that this Court in *Bakelite* failed to take into account pertinent historical considerations and "reached an erroneous conclusion on the basis of mistaken premises." Essentially the same historical considerations, although not in the same depth of detail now put forth by the United States, were presented to the *Bakelite* Court by Solicitor General William D. Mitchell and by the petitioner and intervenors in that case. The Court, composed as it was of Justices of such learning and insight as Chief Justice Taft and Justices Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Sanford and Stone, is not lightly to be assumed to have been misled as to the true constitutional nature of the Court of Customs and Patent Appeals. Yet those Justices were unanimous in their firm belief that this court was but "a legislative and not a constitutional court." 279 U.S. at 458.

And just 14 years later, this Court, under the leadership of Chief Justice Hughes and augmented by the presence of Justices Roberts and Cardozo, again canvassed the problem and unanimously concluded that "Further reflec-

* While there was controversy in *Romero* v. *International Terminal Co.*, 358 U.S. 354, as to the meaning of another portion of the opinion in *American Insurance Co.* v. *Canter*, 1 Pet. 511, there was no suggestion that its authority had been, or should be, undermined. See 358 U.S. at 364-365, and 399-402.

tion tends only to confirm the views expressed in the Bakelite Corp. opinion as to the status of the Court of Customs and Patent Appeals, and we feel bound to reaffirm and apply them." *Williams* v. *United States*, 289 U.S. 553, 571. This time, Solicitor General Thomas D. Thacher urged upon the Court the correctness of the *Bakelite* decision.[10]

To overturn such a well-established conclusion so as retroactively to invest a retired judge of the Court of Customs and Patent Appeals with Article III status is a most serious step. Judge Jackson was nominated and confirmed, served on that court for nearly 15 years, and retired therefrom in 1952 on the assumption and understanding of all concerned that he was a legislative court judge who, in Chief Justice Marshall's words, was "incapable of receiving" Article III power. By what principle of law can he now receive in 1961—in his retired status—all the indicia of Article III power during his tenure on the Court of Customs and Patent Appeals? If the *Bakelite* decision is to be overturned, can the impact fairly be applied retroactively? And by what process of osmosis can he suddenly acquire, for purposes of a trial which occurred over a year ago, the essential attributes of Article III power?

The only rational answer is that an overruling of the *Bakelite* doctrine, if this Court so decides, must be prospective in nature. Petitioner is entitled to the benefits of the state of the law at the time of his trial. And at that time, and even now, the law was clear that a judge of the Court of Customs and Patent Appeals possessed no Article III power which entitled him to preside at a criminal

[10] Despite earnest argument by the United States, the Court again refused to reconsider the *Bakelite* and *Williams* doctrines in *Pope* v. *United States*, 323 U.S. 1.

trial in the District Court. By its great insistence on overruling the *Bakelite* case, the Government concedes as much.

Conclusion

For the foregoing reasons, as well as those expressed in petitioner's main brief, the judgment below should be reversed or vacated.

Respectfully submitted,

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May 1, 1961

SUPREME COURT OF THE UNITED STATES

No. 669.—October Term, 1960.

Benny Lurk, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 29, 1961.]

Per Curiam.

The judgment of the Court of Appeals is reversed and the case is remanded to that court. *Ellis* v. *United States*, 356 U. S. 674.

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[May 29, 1961.]

Mr. Justice Frankfurter, whom Mr. Justice Harlan and Mr. Justice Stewart join, dissenting.

In my view *Ellis* v. *United States*, 356 U. S. 674, on the basis of which the case is sent back to the Court of Appeals, does not fit the facts and circumstances of this case.

In support of his contention that he was wrongfully denied the right to appeal *in forma pauperis*, petitioner presents for our consideration two grounds for reversal of his conviction of robbery in the United States District Court for the District of Columbia. The first contention, concerning the admission at his trial of allegedly prejudicial evidence, is so lacking in merit as to be plainly frivolous. It would not justify an appeal *in forma pauperis*. But petitioner also raises a jurisdictional question, *viz.*, whether he could constitutionally be tried by a court presided over by a retired judge of the Court of Customs and Patent Appeals. This question, therefore, would have warranted review by the Court of Appeals.

Solution of this problem will call into consideration a number of subsidiary questions. What are the characteristics of an Article III court? Is the Court of Customs and Patent Appeals an Article III court? If so, when did it become such a court? Assuming *arguendo*

that the Court of Customs and Patent Appeals has been an Article III court only since 1958 (when Congress enacted legislation conferring that status), what is the bearing of this fact on the status of a judge who retired from the court prior to that time?

These are not questions on which, with all due respect, a lower court can be of effective assistance to this Court. They do not involve the evaluation of evidence or the application of rules of local law or special familiarity and experience with the materials and the underlying considerations on which judgment must be based. On the contrary, the constitutional history and the cases upon which the decision ultimately must turn are the special concern of this Court. Indeed, the questions posed would be entirely suitable for certification to this Court by a lower appellate court. See 28 U. S. C. § 1254. Cf. *United States* v. *Mayer*, 235 U. S. 55. Furthermore, the administration of justice in the federal courts demands a speedy disposition of this dispute. Until it is settled, assignment of retired judges to help clear dockets in federal courts under a litigious cloud will be hampered by uncertainty.

Nothing could be more obvious than that the Court of Appeals, no matter how it may decide the question now put in its keeping, will have it only temporarily. The inevitable final destination of the case is this Court. Decision here should not be delayed by wastefully time-consuming remand to the Court of Appeals of a question that is already before us.